No. 93-141

In The

Supreme Court of the United States

October Term, 1993

DEPARTMENT OF REVENUE OF THE STATE OF MONTANA,

Petitioner,

vs.

KURTH RANCH; KURTH HALLEY CATTLE COMPANY; RICHARD M. and JUDITH KURTH, husband and wife; DOUGLAS M. and RHONDA I. KURTH, husband and wife; CLAYTON H. and CINDY K. HALLEY, husband and wife; ROBERT G. DRUMMOND, TRUSTEE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

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July, 1993

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APPENDIX

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: KURTH RANCH; KURTH HALLEY CATTLE COMPANY; RICHARD M. KURTH; JUDITH KURTH, husband and wife; et al., *Debtors,*	No. 91-35878 D.C. No. CV-90-084-PGH OPINION
ROBERT G. DRUMMOND, Trustee, *Appellee,* v. DEPARTMENT OF REVENUE OF THE STATE OF MONTANA, *Appellant.*	

Appeal from the United States District Court
for the District of Montana
Paul G. Hatfield, District Judge, Presiding

Argued and Submitted
August 19, 1992 – Seattle, Washington

Filed February 26, 1993

Before: Eugene A. Wright, Robert R. Beezer, and Edward Leavy, Circuit Judges.

Opinion by Judge Beezer

SUMMARY

Criminal Law and Procedure/Double Jeopardy/Due Process/Individual Rights/Constitutional Rights/ Narcotics/Defendants and Accused, Rights of/Civil Litigation and Procedure/Bankruptcy/Claims/Tax/ Litigation and Procedure (Civil)

The court of appeals affirmed a judgment of the district court. The court held that where there has been a separate criminal conviction for marijuana possession, double jeopardy precludes a subsequent action to collect a tax on that marijuana unless there is a demonstrated rational relationship between the sanction imposed and the damages suffered by the government.

The Kurth family began cultivating marijuana to pay off a debt against the family farm. A law enforcement raid on the farm resulted in the seizure of large quantities of plants, harvested crop and marijuana derivatives. The Kurths were charged with criminal possession and sale. They pleaded guilty and received individual sentences. Following their arrests, appellant Department of Revenue of the State of Montana assessed a drug tax against the Kurths totalling approximately $865,000, pursuant to the Dangerous Drug Tax Act. Following their convictions, the Kurths filed a voluntary petition in bankruptcy. The Department of Revenue filed a claim with the bankruptcy court which was challenged by the Kurths and by the trustee in bankruptcy. The bankruptcy court denied the Department's claim, finding after a bench trial that as applied to the Kurths the tax impermissibly punished them a second time in violation of the double jeopardy clause. The district court affirmed the bankruptcy court's

order. In both bankruptcy and district court, the Department declined to make a showing regarding the costs incurred in enforcing the dangerous drug laws.

[1] The double jeopardy clause of the Constitution protects against multiple punishments for the same offense. [2] A disproportionately large civil sanction imposed in a civil proceeding subsequent to a criminal conviction for the same conduct may constitute punishment prohibited by the double jeopardy clause. [3] The label the state gives to the sanction, e.g. tax, is not dispositive on the question of impermissible second punishment, which requires a particularized assessment of the penalty imposed and the purposes that penalty may fairly be said to serve. [4] Punishment serves the aims of deterrence and retribution. Where a civil sanction cannot fairly be said to serve only a remedial purpose, but can be explained only as also serving deterrent or retributive purposes, it is punishment. [5] Proper analysis in such circumstances requires the trial court to determine whether there is a rational relationship between the sanction imposed and the damages suffered by the government. [6] Without evidence justifying imposition of the tax, the tax as applied to the Kurths constitutes an impermissible second punishment in violation of the double jeopardy clause.

COUNSEL

Paul Van Tricht, Special Assistant Attorney General, Helena, Montana, for the appellant. Joseph Brian Cox, Special Assistant Attorney General, Topeka, Kansas, Amicus Curiae States of Kansas, Florida, and Texas, for the appellant.

James H. Goetz and Brian K. Gallik, Goetz, Madden & Dunn, Bozeman, Montana, for the appellee.

OPINION

BEEZER, Circuit Judge:

We consider whether Montana's Dangerous Drug Tax Act violates the Fifth Amendment's proscription against double jeopardy.

The district court for the district of Montana affirmed the bankruptcy court's ruling that a $100-an-ounce marijuana tax levied pursuant to the Act violated the Fifth Amendment. The Montana Department of Revenue ("Revenue") appeals, arguing that the drug tax is not a punishment and that its imposition against the Kurths does not violate double jeopardy. The Kurths maintain that a criminal penalty by any other name is still a criminal penalty, and that the district court properly relied on *United States v. Halper*, 490 U.S. 435 (1989) in holding the drug tax as applied is unconstitutional. We affirm.

I

The extended Kurth family entered the marijuana-growing business "with but one purpose – that of making large sums of money just as fast as possible in order to pay off a large debt against the family farm." *Montana v. Kurth*, No. DC-87-018 Judgment and Sentencing Order at 3 (Mont. 12th Dist. Ct., July 18, 1988).

The Kurths cultivated marijuana for about a year and a half before discovery by law enforcement officials. On October 18, 1987, offices raided the farm and seized 2155

marijuana plants, 1811 ounces of harvested marijuana and several gallons of marijuana derivatives. They also arrested the Kurths, who were subsequently charged with the criminal possession and sale of dangerous drugs.

Shortly before the Kurths' arrests, Montana's Dangerous Drug Tax Act was enacted. *See* Mont. Code Ann. §§ 15-25-101 through 123 (1987).[1] The arresting officer's Drug Tax Report describing the substances found at the Kurth farm was the first ever sent to the Montana Department of Revenue. Pursuant to the Act, Revenue assessed a drug tax against the Kurths. The assessment ultimately totaled nearly $865,000 for the marijuana plants, harvested marijuana, hash tar, and hash oil.

The Kurths administratively challenged both the method of computation and the legality of the assessment. This challenge was suspended pending resolution of the Kurths' criminal charges. In July 1988, the Kurths all pleaded guilty and received individual sentences.

The Kurths then filed a voluntary petition in bankruptcy under Chapter 11, again staying the administrative proceeding. In February 1989, Revenue filed an amended proof of claim with the bankruptcy court which was challenged by the Kurths and the trustee in bankruptcy.

In May 1990, following a bench trial, the bankruptcy court denied Revenue's claim. The court determined that the taxes on the plants, hash tar, and hash oil were

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[1] The Montana legislature amended this law in 1989 and again in 1991. Revenue assessed the taxes under the 1987 version. *See* Mont. Code Ann. §§ 15-25-101 through 123 (1987).

arbitrary, capricious, and violative of the drug tax statute. The court also concluded that although the remaining $208,105 tax on the harvested marijuana was computed in compliance with the statute, its application here violated the Kurths' constitutional rights; the tax assessment served to punish the Kurths a second time for conduct to which they had pleaded guilty and been punished. Relying particularly on *Halper*, the court determined that this "second punishment" violated the double jeopardy clause of the Fifth Amendment. *In re Kurth Ranch*, No. 88-40629, 289/0042, 145 B.R. 61 (Bankr. D. Mont., May 8, 1990).

The district court affirmed the bankruptcy court's order. *Drummond v. Dept. of Revenue*, No. CV-90-084-PGH, 1991 WL 365065, at *4 (D. Mont., April 23, 1991). Revenue does not challenge the bankruptcy and district court's holding that the original assessment of $865,000 was arbitrary and capricious; Revenue appeals only the determination that the $208,105 tax on the harvested marijuana is unconstitutional.

II

We review *de novo* a challenge to the constitutionality of a state statute. *Jackson Water Works, Inc. v. Public Util. Comm'n*, 793 F.2d 1090, 1092 (9th Cir. 1986), *cert. denied*, 479 U.S. 1102 (1987).

[1] The Double Jeopardy Clause of the Constitution protects against three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense. *United States*

v. Halper, 490 U.S. at 440. The third of these protections is at issue in this case.

[2] The multiple-punishment prohibition applies only when the State attempts to criminally punish a defendant twice for the same offense. *United States v. One Assortment of 89 Firearms*, 465 U.S. 354 (1984). The clause does not bar the State from imposing both a civil and a criminal penalty upon a defendant for the same offense, *Helvering v. Mitchell*, 303 U.S. 391 (1938), nor is the State barred from imposing a criminal and civil sanction in a single proceeding, as long as the court determines that "the total punishment [does] not exceed that authorized by the legislature." *Halper*, 490 U.S. at 450 (citing *Missouri v. Hunter*, 459 U.S. 359, 368-69 (1983)). A disproportionately large civil sanction imposed in a subsequent civil proceeding, however, may constitute "punishment" within double jeopardy's multiple-punishment prohibition. *Id.*

[3] Although the Montana statute labels the assessment as a "tax," this in itself is not dispositive as to whether this imposition constitutes an impermissible second punishment. A state cannot evade the prohibitions of the federal constitution merely by changing the label of the punishment. Indeed, " 'labels affixed either to the proceeding or to the relief imposed . . . are not controlling and will not be allowed to defeat the applicable protections of federal constitutional law.' " *Id.* at 448 (quoting *Hicks v. Feiock*, 485 U.S. 624, 631 (1988)). The determination whether a civil sanction constitutes punishment "requires a particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve. . . . [A] civil as well as a criminal sanction

constitutes punishment when the sanction as applied in the individual case serves the goals of punishment." *Id.*

[4] Punishment serves the twin aims of retribution and deterrence. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963). The Supreme Court teaches us that "a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term." *Halper*, 490 U.S. at 448.

The Court has succinctly described the reason for the rule:

> Where a defendant previously has sustained a criminal penalty and a civil penalty sought in the subsequent proceeding bears no rational relation to the goal of compensating the Government for its loss, but rather appears to qualify as "punishment" in the plain meaning of the word, then the defendant is entitled to an accounting of the Government's damages and costs to determine if the penalty sought in fact constitutes a second punishment.

Id. at 449-50.

[5] Under *Halper*, the double jeopardy analysis requires the trial court to determine whether there is a rational relationship between the sanction imposed and the damages suffered by the government. Although the trial court's determination may often be no more than an approximation, "even an approximation will go far towards ensuring both that the Government is fully compensated for the costs of corruption and that, as required

by the Double Jeopardy Clause, the defendant is protected from a sanction so disproportionate to the damages caused that it constitutes a second punishment." *Id.* at 450.

Finally, the rule in *Halper* is limited to "the rare case . . . where a fixed-penalty provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused." *Id.* at 449.

It should be noted that *Halper*'s disproportionality analysis is required only in those cases where there has been a separate criminal conviction. A state may legitimately tax criminal activities. *See Marchetti v. United States*, 390 U.S. 39, 44 (1968). Moreover, there is no need for the civil sanction to be tied to any remedial analysis when it is imposed apart from a criminal conviction. *See Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 623 (1981).

Where the case does involve a previous criminal conviction, however, special considerations come into play. Here, the most relevant consideration is the character of the sanction and whether it may fairly be called punitive in nature. *See Halper*, 490 U.S. at 449-50. This distinguishes this case from those cited by Revenue which hold a marijuana tax to be non-punitive, but do not involve a previous criminal conviction. *See Minor v. United States*, 396 U.S. 87 (1969); *United States v. Sanchez*, 340 U.S. 42 (1950); *see also Simmons v. United States*, 476 F.2d 715, 718-19 (10th Cir. 1973).

III

The Kurths were criminally prosecuted for possession and sale of dangerous drugs. The double jeopardy analysis under *Halper* applies. If the additional civil sanction appears sufficiently disproportionate to the remedial goals claimed by Revenue, the Kurths are entitled to an accounting in order to determine if the sanction constitutes an impermissible additional punishment.

The record in this case, however, is devoid of the information necessary to make a determination of proportionality. Despite opportunities to do so before the bankruptcy and district courts, Revenue refused to make any showing regarding the costs incurred in eradicating dangerous drugs and their effects.

Revenue asks us to take judicial notice of the high but incalculable cost of drug abuse on the state of Montana. Certainly, other federal courts have noted the staggering costs associated with fighting drug abuse in this country. *See United States v. A Parcel of Land with a Bldg. Located Thereon,* 884 F.2d 41, 44 (1st Cir. 1989) (discussing the "billions the government is being forced to spend" on enforcing drug laws). Indeed, the Montana Supreme Court has recently addressed this very issue and found that the marijuana tax "is not excessive in relation to the remedial purposes addressed in § 15-25-122." *Sorenson v. Montana Dep't of Revenue,* No. 91-379, slip op. at 5 (Mont. S.C. July 21, 1992).

We observe that the *Sorenson* court did not require the State to make any showing regarding its costs and

expenses.[2] Absent even a "rough" showing by the State regarding its actual costs in the case, we see no reason to question the district court's refusal to "take judicial notice" of drug abuse's general costs to society.[3]

We agree with the bankruptcy court, as did the district court, that allowing the state to impose this tax, without any showing of some rough approximation of its actual damages and costs, would be sanctioning a penalty which *Halper* prohibits.

[6] By refusing to offer any evidence justifying its imposition of the tax, the State has failed to meet the threshold requirements under *Halper.* We do not hold the Montana marijuana tax is unconstitutional on its face; we do hold it is unconstitutional as applied against the Kurths. The tax assessment levied by Revenue in this case

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[2] In fact, the court did not believe *Halper* was implicated at all: "a tax requires no proof of remedial costs on the part of the state." *Id.* at 8-9. The Court also noted that its tax was "comparable to those in other states and also comparable to the amounts in effect for many years during the effective period of the Federal Drug Tax Act . . . " *Id.* at 9. As we have noted, this ignores the particularized double jeopardy inquiry required under *Halper.*

[3] This case is distinguishable from *United States v. Walker,* 940 F.2d 442, 444 (9th Cir. 1991), where we upheld a district court decision that imposed a $500 sanction for importation of marijuana and that took judicial notice of the "financial burden associated with maintaining check points and administering the customs system." In the case before us, the district court refused to take "judicial notice" of the general costs of drug law enforcement, and construed *Halper* to require a more particularized showing of the actual damages to the State.

constitutes an impermissible second punishment in violation of the federal Constitution's Double Jeopardy Clause.

The judgment of the district court is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

IN RE: KURTH RANCH; KURTH HALLEY CATTLE COMPANY; RICHARD M. and JUDITH COMPANY; RICHARD M. and JUDITH KURTH, husband and wife; et al., Debtors. ROBERT G. DRUMMOND, Trustee, Plaintiff and Appellee, vs. DEPARTMENT OF REVENUE OF THE STATE OF MONTANA, Defendant and Appellant.	NO. CV-90-084-GF MEMORANDUM AND ORDER (Filed Apr. 23, 1991)

The Department of Revenue of the State of Montana ("D.O.R.") instituted the present action seeking judicial review of a May 8, 1990, order of the United States Bankruptcy Court for the District of Montana. The D.O.R. takes issue with, *inter alia*, the bankruptcy court's decision holding the tax levied on the debtors,[1] pursuant to

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[1] The debtors, hereinafter referred to as "the Kurths", refers to Richard and Judith Kurth, Douglas and Rhonda Kurth, and

the Montana Dangerous Drug Tax Act, Mont.Code Ann. §§ 15-25-101, *et seq.* (1987), was a "penalty" which violated the fifth amendment's proscription against double jeopardy. Jurisdiction vests with this court pursuant to 28 U.S.C. § 158.

PROCEDURAL HISTORY

On October 18, 1987, federal and state law enforcement personnel searched the Kurth ranch and seized marijuana plants, several pounds of harvested marijuana and other marijuana derivatives. The Kurths were subsequently charged with criminal possession and sale of dangerous drugs.

Following an inventory of the drugs seized, Chouteau County Deputy Sheriff Doug Williams filed a "Dangerous Drug Tax Report" with the D.O.R., pursuant to the Montana Dangerous Drug Tax Act ("the Act").[2] Based on that report, the D.O.R. ultimately assessed a tax

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Clay and Cindy Halley. The Kurths were formerly engaged in a mixed grain and livestock operation on their farm in Choteau, County, Montana.

[2] The Act provides "a tax on the possession and storage of dangerous drugs," and imposes liability for the tax on "each person possessing or storing dangerous drugs." Mont.Code Ann. § 15-25-111(1). Section 1525-113(1) of the Act further provides:

> All law enforcement personnel and peace officers shall promptly report each person subject to the tax to the department [D.O.R.], together with such other information which the department may require, in a manner and on a form prescribed by the department.

on the Kurths, including penalties and interest, of $750,096.68.

The Kurths filed a timely administrative challenge regarding the tax, which was suspended, pending resolution of the outstanding criminal charges.[3] Thereafter, the D.O.R. appointed a hearings examiner and the parties began discovery.

On September 9, 1988, the Kurths filed a voluntary petition in bankruptcy under Chapter 11, Tile 11, United States Code, thereby automatically staying, pursuant to 11 U.S.C. § 362(a), the administrative proceedings before the D.O.R. On November 14, 1988, the D.O.R. filed a proof of claim in the bankruptcy court in the amount of $908,078.14. The D.O.R. also moved for relief from the automatic stay, which the bankruptcy court denied.

On February 13, 1989, the D.O.R. filed an amended proof of claim for $864,940.99. In response, the Kurths filed a "Combined Objection to Proof of Claim and Complaint to Determine Dischargability [sic] of Indebtedness and for Declaratory and Injunctive Relief." The Kurth's complaint asserted, *inter alia*, several challenges to the Act and the D.O.R.'s amended proof of claim.

Following extensive discovery, the bankruptcy court set the matter for trial on March 27 and 28, 1990. Thereafter, having considered the parties' post-trial briefs, the bankruptcy court, on May 8, 1990, held the disputed tax assessments were arbitrary and capricious and denied the D.O.R.'s amended proof of claim. The bankruptcy court

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[3] On July 18, 1988, after entering guilty pleas, the Kurths were sentenced to various prison terms.

further held that the tax assessments, even if imposed in a procedurally correct manner, violated the fifth amendment's proscription against double jeopardy.

On appeal, the D.O.R. asserts two principal challenges to the bankruptcy court's decision. First, it contends the bankruptcy court lacked subject matter jurisdiction and, therefore, should have lifted the automatic stay or abstained from addressing the constitutional issues. Second, it contends the bankruptcy court erred in holding the subject tax assessments violated the double jeopardy clause.

DISCUSSION

A. Jurisdiction

The D.O.R. asserts the bankruptcy court, as a non-Article III court, lacked the power to adjudicate the constitutionality of the Montana Dangerous Drug Tax Act. The D.O.R. premises its position on the Supreme Court's decision in *Northern Pipeline Construction v. Marathon Pipeline Co.*, 458 U.S. 50 (1982).

In *Marathon*, a Chapter 11 debtor filed a breach of contract claim with the bankruptcy court, invoking jurisdiction pursuant to the Bankruptcy Reform Act of 1978 ("1978 Act").[4] The defendant asserted the 1978 Act unconstitutionally conferred Article III judicial power upon judges who lacked life tenure and protection

[4] The Bankruptcy Reform Act of 1978 conferred jurisdiction on the bankruptcy court over all "civil proceedings arising under title 11 or arising in or related to cases under title 11." 28 U.S.C. § 1471 (Supp. IV 1976).

against salary diminution. The Supreme Court agreed and, in a plurality opinion, affirmed the dismissal of the debtor's breach of contract claim.

The Supreme Court has subsequently acknowledged the narrow scope of the *Marathon* decision.

> The court's holding in [*Marathon*] establishes only that Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, without consent of the litigants, and subject only to ordinary appellate review.

Thomas v. Union Carbide Agricultural Products Co., 473 U.S. 568, 584 (1985). *See also, Commodity Futures Trading Commission v. Schor*, 478 U.S. 833 (1986).

Congress, in response to the *Marathon* decision, enacted the Bankruptcy Amendments and Federal Judgeship Act of 1984 ("BAFJA"), in an effort to cure the jurisdictional deficiencies in the 1978 Act. The BAFJA distinguishes "core" bankruptcy proceedings from those merely "related to" title 11 cases. *In re Arnold Print Works, Inc.*, 815 F.2d 165, 166 (1st Cir. 1987). Upon referral from the district court, the bankruptcy court has full statutory authority to "hear and determine . . . all core proceedings. . . . " *Id., citing*, 28 U.S.C. 157(b)(1).

The determination of a debtor's tax liability constitutes a core proceeding under 28 U.S.C. § 157(b)(2)(B) (Supp. IV 1986), and 11 U.S.C. § 505(a)(1) (1982). *In re Hunt*, 95 B.R. 442, 444 (Bkrtcy. N.D. Tex. 1989). *See also, In re Lipetsky*, 64 B.R. 431, 434 (Bkrtcy. Mont. 1986). As a

threshold matter, 11 U.S.C. § 505 empowers the bankruptcy court to determine a debtor's tax liability provided the merits of the tax claim have not been previously adjudicated in a contested proceeding before a court of competent jurisdiction. *Id., citing,* 28 U.S.C. 505(a)(1).[5] In the present action, it is beyond dispute that the amount and legality of the subject tax assessments were not fixed by final order of an administrative or judicial court prior to the filing of the Kurth's Chapter 11 petition.

The narrow interpretation given the *Marathon* decision, coupled with the history of bankruptcy court jurisdiction over actions like this, and the differences between the present action and *Marathon* with respect to fairness and practicality, convince this court that the bankruptcy court could "hear and determine" the validity of the D.O.R.'s proof of claim. The court recognizes the bankruptcy court retains the power to abstain from deciding a case for reasons of justice, comity with state courts, or

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[5] Section 505(a) allows a review of "any tax." 11 U.S.C. 505(a). As a result, both state and federal tax liabilities may be reviewed, provided that the review complies with the language of § 505(a)(2)(A). *In re Galvano,* 116 B.R. 367, 372 n.6 (Bkrtcy. E.D.N.Y. 1990). Thus, for example, bankruptcy courts have reviewed assessments of state Retailers' Occupation Taxes, *In re Northwest Beverage, Inc.*, 46 B.R. 631 (Bkrtcy. N.D. Ill. 1985), state sales taxes, *In re Tapp*, 16 B.R. 315 (Bkrtcy. Alaska 1981), state real property taxes, *In re Lipetsky,* 64 B.R. 431 (Bkrtcy. Mont. 1986), city ad valorem taxes, *In re Electronic Theatre Restaurants. Inc.*, 85 B.R. 45 (Bkrtcy. N.D. Ohio 1988), federal income taxes, *In re Dolard,* 519 F.2d 282 (9th Cir. 1975), and federal employment taxes, *In re Vermont Fiberglass, Inc.*, 76 B.R. 358 (Bkrtcy. Vt. 1987). *Id.*

respect for state law, 28 U.S.C. § 1334(c)(1), but no such reason applies here. *Cf. In re Franklin Computer Corp.*, 50 B.R. 620, 626 n.8 (Bkrtcy. E.D. Pa. 1985); *In re Pioneer Development Corp.*, 47 B.R. 624, 628 (Bkrtcy. N.D. Ill. 1985).

The D.O.R. also alleges the Bankruptcy Amendments and Federal Judgeship Act of 1984 is unconstitutional in that it purports to confer jurisdiction upon bankruptcy courts that exceeds the limits of Article III. The court is unpersuaded by the D.O.R.'s argument in support of its position.

Therefore, the court concludes the bankruptcy court properly exercised jurisdiction over the present action. The court turns to address the merits of the subject tax assessments.

B. Tax Assessments

The bankruptcy court, in denying the D.O.R.'s proof of claim, held the tax assessments, although a civil penalty, served to punish the Kurths a second time for conduct to which they had plead guilty and been sentenced.[6] As a result, the court, relying on *United States v. Halper,* 490 U.S. 435 (1989), determined the tax assessments violated the double jeopardy clause of the fifth amendment.[7]

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[6] The bankruptcy court also held the tax assessments were arbitrary and capricious with respect to certain items seized and, furthermore, were computed in a manner contrary to the Montana Dangerous Drug Tax Act. This portion of the bankruptcy court's decision is unchallenged on appeal.

[7] The double jeopardy clause protects against three abuses: (1) a second prosecution for the same offense after acquittal; (2)

In *Halper*, the Supreme Court ruled that the double jeopardy clause barred the government from seeking civil penalties under the False Claims Act, 31 U.S.C. §§ 3729-3731, where the defendant had already been sanctioned criminally, and where the penalties sought in the civil proceeding bore no relation to the injury sustained by the government. A unanimous Court stated:

> We therefore hold that under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution.

490 U.S. at 448-449.

The Court recognized that in those cases where the purpose of a civil sanction is to compensate the government for its damages and costs, it may be difficult to prove, if not impossible to ascertain, such damages at the point beyond which the sanction takes on the quality of punishment. 490 U.S. at 449. In such cases, the Court recognized that the process of affixing a sanction to compensate the government invariably would involve an element of "rough justice." *Id.* With that in mind, the Court noted:

> Where a defendant previously has sustained a criminal penalty and the civil penalty sought in the subsequent proceeding bears no rational

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a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969).

> relation to the goal of compensating the Government for its loss, but rather appears to qualify as "punishment" in the plain meaning of the word, then the defendant is entitled to an accounting of the Government's damages and costs to determine if the penalty sought in fact constitutes a second punishment.

490 U.S. at 449-450.

In the present action, the D.O.R. maintains the Montana Dangerous Drug Tax Act is simply a revenue raising measure, whereby the amount of tax is determined by the type and quantity of the drug possessed. Accordingly, the D.O.R. asserts the Kurths' tax liability is directly related to the amount of marijuana found on their ranch.

The D.O.R. further asserts the Montana Dangerous Drug Tax Act "is designed to recover some of the millions of dollars Montana spends each year because of illicit drugs." The bankruptcy court rejected the D.O.R.'s argument as "mere hyperbole".

> This latter statement of D.O.R. is mere hyperbole, since the D.O.R. failed to introduce one scintilla of evidence as to the cost of the above government programs or costs of law enforcement incurred to combat illegal drug activity. Moreover, Deputy Sheriff Saville was specifically asked by plaintiffs' counsel if the witness had made *any* (even a rough) estimate as to the cost to the State on prosecution of the Kurth criminal investigations, arrest, and conviction and he replied none was made. Consequently, the D.O.R. faced with the Halper issue, which was raised at the motion for summary judgment stage, put forth no effort at the trial stage, when it had an opportunity to do so, to show the tax is

'rationally related to the goal of making the government whole.' *Halper, Id.* at 1903.

Accordingly, the bankruptcy court concluded:

If D.O.R. were allowed to impose this tax, without any showing of some rough approximation of its actual damages and costs which it seeks to recover to make the State whole, I would, as noted in *U.S. v. Hall*, [730 F.Supp. 646 (M.D. Penn. 1990)] at 674, 'be sanctioning the very type of 'clear injustice' which *Halper* prohibits,' for, on such state of this record, the tax is punishing the debtors twice for the same criminal conduct.

Having carefully reviewed the record herein, together with the parties' briefs in support of their respective positions, the court is compelled to conclude the bankruptcy court's order dated May 8, 1990, was not in error. In this court's opinion, the order was well-reasoned and supported by the evidence of record. The D.O.R. has failed to present a persuasive argument to the contrary. As applied to the factual situation presented, the Montana Dangerous Drug Tax Act simply punishes the Kurths a second time for the same criminal conduct. That fact, coupled with the D.O.R.'s failure to provide the Kurths or the bankruptcy court with an accounting of its actual damages or costs, leads to the inescapable conclusion that the subject tax assessments violated the double jeopardy clause of the fifth amendment.

Accordingly, IT IS HEREBY ORDERED that the May 8, 1990, order of the United States Bankruptcy Court for the District of Montana be, and the same hereby is, AFFIRMED.

DATED this 23 day of April, 1991.

/s/ Paul G. Hatfield
PAUL G. HATFIELD,
CHIEF JUDGE
UNITED STATES DISTRICT
COURT

UNITED STATES BANKRUPTCY COURT

For the _____ District of MONTANA

IN RE

KURTH RANCH, et al ROBERT DRUMMOND, Trustee; KURTH RANCH, et al Plaintiff v. DEPARTMENT OF REVENUE OF THE STATE OF MONTANA Defendant	)	Case No. 88-40629-11 Adversary Proceeding No. 289/0042

JUDGMENT

[x] This proceeding having come on for trial or hearing before the court, the Honorable John L. Peterson, United States Bankruptcy Judge, presiding, and the issues having been duly tried or heard and a decision having been rendered.

[OR]

[ ] This proceeding having come on for trial before the court and a jury, the Honorable , United States Bankruptcy Judge, presiding, and the issues having been duly tried and the jury having rendered its verdict,

[OR]

[ ] This issues of this proceeding having been duly considered by the Honorable , United States

Bankruptcy Judge, and a decision having been reached without trial or hearing,

IT IS ORDERED AND ADJUDGED: IT IS ORDERED the Plaintiffs' Objections to Amended Proof of Claim filed by the Montana Department of Revenue in the sum of $864,940.99 pursuant to the Montana Dangerous Drug Act, Section 15-25-101-123, Mont. Code Ann. (1987) are granted and the Proof of Claim is denied. IT IS FURTHER ORDERED that all sums recovered by the Defendant from the Plaintiff pursuant to the double jeopardy tax assessment shall be forthwith remitted to the Trustee, Robert G. Drummond.

Bernard F. McCarthy ,
Clerk of Bankruptcy Court

[SEAL]
Copy mailed to attached parties in interest this 8th day of May, 1990.
/s/ Kathy Schelin
Deputy Clerk
[Seal of the U.S. Bankruptcy Court
Date of Issuance:
May 8, 1990

By: Kathy Schelin ,
Deputy Clerk

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MONTANA

In re

KURTH RANCH; KURTH HALLEY CATTLE COMPANY; RICHARD M. and JUDITH KURTH, husband and wife; DOUGLAS M. and RHONDA I. KURTH, husband and wife; and CLAYTON H. and CINDY K. HALLEY, husband and wife;

Debtors.

Case No. 88-40629

Adversary Proceeding No. 289/0042

ROBERT G. DRUMMOND, Trustee; KURTH RANCH; KURTH-HALLEY CATTLE COMPANY; RICHARD M. and JUDITH M. KURTH; DOUGLAS M. and RHONDA I. KURTH; and CLAYTON H. and CINDY K. HALLEY,

Plaintiffs,

-vs-

DEPARTMENT OF REVENUE OF THE STATE OF MONTANA,

Defendants.

ORDER

At Butte in said District this 8th day of May, 1990.

The Plaintiff/Trustee and Debtors filed a Complaint under Bankruptcy Rule 7001 to contest the tax assessed pre-petition against the Debtors by the Defendant, Montana Department of Revenue (D.O.R.) under the Montana Dangerous Drug Tax Act, Section 15-25101, et seq., Mont. Code Ann. (1987). The Complaint states thirteen different counts for relief, all of which are denied by the D.O.R. Following answer and discovery, each party sought summary judgment under Bankruptcy Rule 7056, which motions were denied in toto by the Court. The case proceeded to trial on March 27 and 28, 1990. Briefs have been filed by the respective parties and the matter is ripe for decision.

The parties concede this Court has jurisdiction to try and decide this matter under 28 U.S.C. Section 1334 and 11 U.S.C. Section 505, because the tax claim has not been contested by the Debtors and adjudicated by a judicial or administrative tribunal of competent jurisdiction before the filing of the Chapter 11 case. *In re Lipetsky*, 64 B.R. 431 (Bankr. Mont. 1986); *Quattrone Accountants, Inc. v. I.R.S.*, 895 F.2d 921 (3rd Cir. 1990). *Lipetsky* states:

> "The determination of a debtor's tax liability is a core proceeding under Section 157 of the Code, and this Court thus has jurisdiction [under Section 505] to determine the amount and legality of the tax, except where said tax has been fixed by final order of an administrative or

judicial tribunal, after being reasonably contested by the taxpayers." *Id.* at 434.

The final Pre-Trial Order signed in this adversary proceeding sets forth Agreed Facts as follows in paragraphs 1 - 27, to-wit:

1. The Plaintiff, Richard M. Kurth, is a former rancher/farmer who, along with the other Plaintiffs in this action, engaged in a mixed grain and livestock operation on their Choteau County, Montana, farm.

2. The Plaintiff, Judith M. Kurth, is the wife of Richard M. Kurth. Mrs. Kurth assisted her husband and the other Plaintiffs in the operation of the Plaintiffs' ranch and farm.

3. The Plaintiff, Douglas M. Kurth, is the son of Richard and Judith Kurth and participated in the farm and ranch operations conducted on the Plaintiffs' Choteau County, Montana, ranch and farm.

4. The Plaintiff, Rhonda I. Kurth, is the wife of Douglas M. Kurth and participated in the farm and ranch operations conducted on the Plaintiffs' Choteau County, Montana, ranch and farm.

5. The Plaintiff, Clayton H. Halley, is the son-in-law of Richard and Judith Kurth and participated in the Plaintiffs' farm and ranch operations in Choteau County, Montana.

6. The Plaintiff, Cindy K. Halley, is the wife of Clayton Halley and daughter of Richard and Judith Kurth. Mrs. Halley assisted in the farm and ranching activities conducted on the Plaintiffs' ranch and farm.

7. The Kurth-Halley Cattle Company was a family partnership engaged in the business of raising and selling livestock. The partners in the Kurth-Halley Cattle Company were Doug and Rhonda Kurth and Clayton and Cindy Halley.

8. The Plaintiff, Kurth Ranch, was the name for the general farm and ranch operations conducted by the above-named Plaintiffs on their Choteau County ranch and farm.

9. The Plaintiff, Robert G. Drummond, is the Trustee of the bankruptcy estate.

10. The Defendant, State of Montana, Department of Revenue, is an executive branch agency created by MCA § 2-15-1301.

11. The Plaintiffs (Richard and Judith Kurth, Clay and Cindy Halley, and Doug and Rhonda Kurth) were formerly engaged in a mixed grain and livestock operation on their Choteau County, Montana, farm.

12. After suffering for several years from draught and low market prices, the Plaintiffs incurred large debts and faced the prospect of losing their family farm.

13. The Plaintiffs, in December, 1985 or January, 1986, began growing and selling marijuana.

14. The Plaintiffs' marijuana operation continued until October 18, 1987, when state and federal law enforcement personnel raided the Plaintiffs' farm.

15. On October 18, 1987, the State of Montana seized the following alleged items from the Plaintiffs:

"Item #1: 2155 marijuana plants in various stages of growth,

Item #2: 7 gallons of hash oil,

Item #3: 4 bags of marijuana at two pounds each,

Item #4: 65/one gram vials of hash tar,

Item #5: 14 baby food size jars of hash tar,

Item #6: 7 pint jars of hash tar,

Item #7: 1 bag of marijuana, 1/4 pound,

Item #8: 5 plastic bags of marijuana; total 2230 grams,

Item #9: approximately 100 pounds of marijuana stems, leaves, parts, etc."

16. The Plaintiffs were subsequently charged by Information with criminal possession and sale of dangerous drugs.

17. On July 18, 1988, after the Plaintiffs entered guilty pleas, the Honorable District Court Judge Chan Ettien of the Montana Twelfth Judicial District, Choteau County, sentenced the Plaintiffs to the following prison terms:

a. *Richard M. Kurth: Count I*: The Defendant is sentenced to a term of twenty (20) years in the Montana State Prison with the last fifteen (15) years suspended for the commission of the offense of criminal sale of dangerous drugs, marijuana, in violation of Montana law Section 45-9-101, MCA; *Count II*: The Defendant is sentenced to a term of twenty (20) years in the Montana State

Prison with the last fifteen (15) years suspended for the commission of the offense of criminal possession of a dangerous drug, marijuana, with intent to sell in violation of Montana law, Section 45-9-103, MCA; *Count III*: The Defendant is sentenced to a term of twenty (20) years in the Montana State Prison with the last fifteen (15) suspended for the commission of the offense of solicitation to commit the offense of criminal possession of a dangerous drug, marijuana, with intent to sell, in violation of Section 45-4-101, MCA; and *Count IV*: The Defendant is sentenced to a term of five years in the Montana State Prison for the commission of the offense of criminal possession of a dangerous drug, hashish, in violation of Montana law Section 45-9-102, MCA.

b. *Judith M. Kurth*: The Defendant . . . is hereby sentenced to a term of five (5) years in the Women's Correctional Center in Warm Springs, Montana, or such other authorized place, with the last four (4) years suspended for the commission of the crime of conspiracy to commit the offense of criminal possession of a dangerous drug, marijuana, with intent to sell, a felony, in violation of Montana law, Section 45-4-102, MCA;

c. *Douglas Kurth*: The Defendant . . . is hereby sentenced to a term of twenty (20) years in the Montana State Prison, Deer Lodge, Montana, with all twenty (20) years suspended for the commission of the crime of conspiracy to commit the offense of criminal possession of a dangerous drug, marijuana, with

intent to sell, a felony, in violation of Montana law, Section 45-4-102, MCA;

d. *Rhonda Kurth*: The imposition of sentence upon the Defendant, Rhonda Kurth, [is] deferred for a period of three (3) years for the commission of the crime of conspiracy to commit the offense of criminal possession of a dangerous drug, marijuana, with intent to sell, a felony, in violation of Montana law, Section 45-4-102, MCA;

e. *Clay Halley:* The Defendant . . . is hereby sentenced to a term of ten (10) years in the Montana State Prison with all of that time suspended for the commission of the crime of conspiracy to commit the offense of criminal possession of a dangerous drug, marijuana, with intent to sell, a felony, in violation of Montana law, Section 45-4-102, MCA;

f. *Cindy Halley*: The imposition of sentence upon the Defendant, Cindy Halley, [is] deferred for three (3) years for the commission of the crime of conspiracy to commit the offense of criminal possession of a dangerous drug, marijuana, with intent to sell, a felony, in violation of Montana law, Section 45-4-102, MCA.

18. MCA § 15-25-111(1) provides "a tax on the possession and storage of dangerous drugs," and imposes liability for the "tax" on "each person possessing or storing dangerous drugs."

19. MCA § 15-25-111(2) provides that the amount of the "tax" due is the greater of the following:

(a) 10% of the assessed market value of the drugs, as determined by the department; or

(b)(i) $100 per ounce of marijuana, as defined in 50-32-101, or its derivatives, as determined by the aggregate weight of the substance seized;

(ii) $250 per ounce of hashish, as defined in 50-32-101, or its derivatives, as determined by the aggregate weight of the substance seized;

(iii) $200 per gram of any substance containing or purported to contain any amount of a dangerous drug included in Schedule I pursuant to 50-32-222(1), (2), (4), and (5), or Schedule II pursuant to 50-32-224(1) through (4), as determined by the aggregate weight of the substance seized;

(iv) $10 per 100 micrograms of any substance containing or purported to contain any amount of lysergic acid diethylamide (LSD) included in Schedule I pursuant to 50-32-222(3), as determined by the aggregate weight of the substance seized;

(v) $100 per ounce of any substance containing or purported to contain any amount of an immediate precursor as defined under Schedule II pursuant to 50-32-224(5), as determined by the aggregate weight of the substance seized; and

(vi) $100 per ounce of any substance containing or purported to contain any amount of dangerous drug not otherwise provided for in this subsection (2).

20. The Defendant initially assessed a Jeopardy Assessment Tax on marijuana and hash tar in the amount of $445,152.25, plus a ten percent (10%) penalty and one

percent (1%) interest, for a total due on December 8, 1987, of $491,776.20.

21. Included within this initial assessment was a tax in the amount of $213,345.00 against 2,155 growing marijuana plants.

22. The Montana Controlled Substances Act, provisions of which are incorporated by reference into MCA § 15-25-111(2), fails to provide a definition of "hash tar."

23. Defendant subsequently revised the assessment, adding a claim for 896 ounces of hash oil at $250.00 per ounce, plus penalty and interest, resulting in a Revised Jeopardy Assessment on May 7, 1988, of $750,096.68.

24. The Montana Controlled Substances Act, provisions of which are incorporated by reference into MCA § 15-25-111(2), fails to provide a definition of "hash oil."

25. Pursuant to the Jeopardy Assessment and Revised Jeopardy Assessment, Defendant has levied upon and seized property and accounts of the Plaintiffs totalling $30,680.01. The assessment is subject to a Judgment and Order of Forfeiture entered by the Honorable District Judge, Chan Ettien of the Montana Twelfth Judicial District Court, Choteau County, in Cause No. DV-87-093.

26. The Defendant initially caused to be filed with this Court in *In re Kurth Ranch; Kurth-Halley Cattle Company; Richard M. Kurth and Judith Kurth (H&W); Douglas M. and Rhonda I. Kurth (H&W); and Clayton H. and Cindy K. Halley (H&W), Debtors,* Case No. 88-40629, a Proof of Claim for "tax" liabilities in the [sic] of $908,078.14.

27. Thereafter, the Defendant, Montana Department of Revenue has caused to be filed herein an Amended Proof of Claim for "tax" liabilities under 11 U.S.C. § 507(a)(7)(A), (C) and (E) in the sum of $864,940.99, consisting of $684,914.30 in principal, $113,134.44 in penalties and $66,914.30 in interest itemized as follows:

1987 (sic) Montana Dangerous Drug Tax:	$669,152.25
Penalty:	$111,634.44
12% Interest 12/8/87-9/8/88:	$ 66,914.30
TOTAL:	$847,690.99
	(sic)

1987 (sic) Montana Dangerous Drug Tax:	$ 15,750.00
Penalty:	$ 1,500.00
12% Interest 12/8/87-9/8/88	$ 0
TOTAL:	$ 17,250.00

The Montana Dangerous Drug Tax Act went into effect on October 1, 1987, about 17 days before the confiscation of the marijuana and related paraphernalia by the Choteau County Sheriff's Office, and U.S. Drug Enforcement Administration (D.E.A.). Regulations dealing with the tax law were not promulgated by the D.O.R. until November 13, 1987. Mont. Admin. R. (ARM.) § 42.34.101 et seq. (1987).

The evidence shows the Plaintiff/Debtors first attempted to grow marijuana from seeds, but such attempts failed to produce any quantity of merchantable crop. Debtors then purchased 86 marijuana plants for $2,500.00, which plants died, and they were then supplied 80 additional plants in the summer of 1986, when Debtors commenced their growing operation inside buildings and

trailers located on the family ranch. The business expanded to the largest marijuana growing operation in the State of Montana when shut down by law enforcement authorities in October, 1987. According to Richard Kurth, each marijuana plant, when fully matured and ready to harvest, produced .65 ounces of marijuana buds, which he sold for about $73.15 per bud. Initially, each plant was destroyed after one harvest, but toward the end of the operation, Debtors began boiling the stems and leaves of the remaining plant (called "shake") in alcohol in an attempt to manufacture marijuana oil or "hash oil." "Shake" is a derivative of the marijuana plant which has less street value because it contains lower tetrahydrocannabinol (THC), the chemical substance in the marijuana bud which activates a user's senses.

The Debtors' operation was closed on October 18, 1987, when law enforcement officers arrested the Debtors and confiscated all plants, materials and paraphernalia on the premises. Under the Montana Drug Tax Act, the arresting officer is obligated to send to the D.O.R., on a form prepared by the D.O.R., a Drug Tax Report listing each item seized. It is noteworthy in this case that the report sent by the Choteau County Sheriff was the first report sent to the D.O.R. because the law became effective just shortly before the drug operation was shut down. Moreover, the arresting officers were provided absolutely no instructions on the form or by other separate instructions from the D.O.R. as to how the report was to be prepared and filed. It is obvious from the evidence in this case that the law enforcement personnel were primarily concerned, as they rightly should have been, with the criminal aspects of the case than with the newly

exacted Drug Tax Act. Accordingly, Douglas Williams, Deputy Sheriff, prepared and filed with the D.O.R. under date of November 16, 1987, the Drug Tax Report which listed the following items, to-wit:

> "Item #1: 2155 marijuana plants in various stages of growth,
>
> Item #2: 7 gallons of hash oil, (lined out),
>
> Item #3: 4 bags of marijuana at two pounds each,
>
> Item #4: 65/one gram vials of hash tar,
>
> Item #5: 14 baby food size jars of hash tar,
>
> Item #6: 7 pint jars of hash tar,
>
> Item #7: 1 bag of marijuana, 1/4 pound,
>
> Item #8: 5 plastic bags of marijuana; total 2230 grams,
>
> Item #9: approximately 100 pounds of marijuana stems, leaves, parts, etc."

Item #2 on the report was lined out because the substance had not undergone chemical analysis by the Montana Division of Forensic Science. The first report contained no monetary value of each item. Thereafter, on November 18, 1987, Deputy Sheriff Williams sent a letter to the Choteau County Attorney regarding the Dangerous Drug Tax Report stating he had requested a dollar amount from D.E.A. to send to the D.O.R. In the November 18, letter, Williams set forth values of each item as follows:

> "Item #1: Marijuana plants valued at $1,500.00,
>
> Item #2: Hash oil - no value set

Item #3: 8 pounds of marijuana at $16,000.00,

Item #4: Vials of hash tar, $10/gram $650.00

Item #5: Baby food size jars hash tar figured at 8 oz.,

Item #6: Pint jars of hash tar @$700.00/oz.,

Item #7: Marijuana @$2,000.00/lb. Item #8: 2230 grams of marijuana @$2,000.00/lb.,

Item #9: approximately 100 pounds of shake at $200.00/lb."

Following such report, on December 1, 1987, Williams sent a letter to Robert S. McGee, head of the Miscellaneous Tax Division of D.O.R., stating that the tax report was previously forwarded on the Kurth operation, and the values of Items 1-9 above set forth in the November 18, letter were repeated in the December 1, letter. Williams stated the values were obtained from the Drug Enforcement (D.E.A.) agent in Great Falls and "the prices are very defensible by the D.E.A. and by the Montana Department of Justice/Criminal Investigation Bureau." Williams advised that if D.O.R. wished to value the hash oil, it should await doing so until the forensic laboratory had an opportunity to test the samples' quality and quantity. On November 20, 1987, Williams sent to the forensic laboratory for testing 23 separate samples of materials, including samples of hash oil, hash tar, fifty-six random samples of leaves taken from the 2155 plants (randomly selected), random samples from ten plastic bags of marijuana and samples from the box of shake. Without waiting for the lab report, which was issued on December 30, 1987, McGee proceeded to issue the tax assessment,

excluding hash oil, on December 7, 1987. McGee conceded at trial he was not an expert on valuation of illegal drugs, and this was the first assessment made under the Drug Tax Act. He called some individuals associated with the D.E.A. in San Francisco about values, but cannot remember the substance of any conversation. He made no contact with the D.E.A. agent in Great Falls, who Williams had reported to have valued the lot. The only documentation of the assessment is the reports from Choteau County and the assessment notice. In making the plant assessment he stated he relied on the value fixed by the Choteau County sheriff's officer, who had reported that the plants were in various states of growth. It is noteworthy that none of the plants were weighed, McGee had no knowledge of the various plant sizes because he did not personally inspect the operation (and never has), he had no information as to budding contents, and his assessment was based on "in-house" discussions with the D.O.R. legal and administrative staff. At trial, McGee was extremely vague as to the substance of any conversation or the results of his cursory investigation as to value.

The December 7, 1987, Statement of Tax Computation, (Exhibit 18) sent to each Debtor individually, calculated the tax as follows:

"Tax on possession and storage of dangerous drugs is the greater of, 10% of assessed market value or dollar amount per weight; 15-25-111, MCA.

2155 Marijuana plants, 10 states of growth value reduced 10% each stage

Plants	Value Per Plant	Total Value	10% Market Value Tax
215.5	$1,800.00	$387,900.00	$38,790.00
215.5	$1,620.00	$349,110.00	$34,911.00
215.5	$1,440.00	$310,320.00	$31,032.00
215.5	$1,260.00	$271,530.00	$27,153.00
215.5	$1,080.00	$232,740.00	$23,274.00
215.5	$ 900.00	$193,950.00	$19,395.00
215.5	$ 720.00	$155,160.00	$15,516.00
215.5	$ 540.00	$116,370.00	$11,637.00
215.5	$ 360.00	$ 77,580.00	$ 7,758.00
215.5	$ 180.00	$ 38,790.00	$ 3,879.00
		Tax on Marijuana Plants	$213,345.00

Other dangerous drugs

Amount	Tax per ounce	Tax
1811 oz. Marijuana	$100.00	$181,100.00
118 oz. Hash Tar	$250.00	$ 29,500.00
	Tax on other drugs	$210,600.00
	Total Tax	$423,945.00
	5% Admin. Fee	21,197.25
	10% Penalty	42,394.50
	1% Interest	4,239.45
	Total Due	$491,776.20"

McGee did not initially value for tax purposes the seven gallons of hash oil because he had no basis on which to fix a value. That item was tested by the forensic laboratory which issued its report on December 31, 1987, stating in part:

> "There is no definition of 'hash oil' in the Montana Controlled Substances Act – or weight ascribed distinguishing felony possession from misdemeanor possession. Because hash oil contains tetrahydrocannabinol (THC), a Schedule I controlled substance, possession of any amount constitutes a felony. Therefore, I did not dry down the hash oil samples to obtain accurate weights since weights are irrelevant. These liquid samples contain varying amounts of volatile solvents which would be represented in a sample weight."

On May 6, 1988, McGee, without requesting the forensic laboratory dry down the oil sample for weight to be assessed under the Drug Tax Act, revised the tax assessment to include a claim for what he termed "Hash Oil," but which was assessed as hashish. He fixed the tax based on 896 ounces of hash oil at $250.00 per ounce for a principal tax of $224,000.00, $22,400.00 for penalty, interest at $15,680.00, for a total additional tax of $262,080.00. Thus, the total tax assessed was $750,096.68. Interest accruing to the date of the Debtors' petition, together with credit for about $30,000.00 collected in state court proceedings, brings a total tax due of $864,940.99.

Whether applying federal or state law, the test of whether the tax is excessive, or arbitrary and capricious, is the same. *Corcoron v. State Board of Equalization*, 154 P.2d 795, 797, holds:

> "It is well settled that the courts will not substitute their judgment for that of the taxing officials in fixing the value of property for tax purposes. *Danforth v. Livingston*, 23 Mont. 558, 59 P.916; *Johnson v. Johnson*, 92 Mont. 512, 15 P.2d 842. The courts will intercede however when it

> appears that the valuation fixed by the taxing officials is so grossly excessive as to amount to arbitrary action or to be inconsistent with the exercise of an honest judgment. *International Business Machine Corporation v. Lewis and Clark County*, 111 Mont. 384, 112 P.2d 477; *Investors Security Co. v. Moore*, 113 Mont. 400, 127 P.2d 225. For purposes of taxation the terms 'value' and 'full cash value' mean the amount at which property would be taken in payment of a just debt due from a solvent debtor. Ch. 99, Laws 1939."

Corcoron involved a factual setting where city lots were valued by the County Assessor at about 10 times their value. The court found the assessment excessive, and therefore arbitrary.

In *Pizzarello v. United States*, 408 F.2d 579, (2nd Cir. 1969), a case involving an illegal gambling operation, a jeopardy assessment under 26 U.S.C. § 6862(a) was made by the Internal Revenue Service. *Pizzarello* held:

> "We begin with the assumption that a tax assessment is presumptively valid and that the burden is on the taxpayer to prove its invalidity. *Helvering v. Taylor*, 293 U.S. 507, 55 S.Ct. 287, 79 L.Ed. 623 (1935); *Commissioner of Internal Revenue v. Hansen*, 360 U.S. 446, 79 S.Ct. 1270, 3 L.Ed.2d 1360 (1959). Such a presumption is not evidence itself and disappears upon the introduction of evidence to overcome it. *Compton v. United States*, 334 F.2d 212 (4th Cir. 1964); *New York Life Insurance Co. v. Gamer*, 303 U.S. 161, 58 S.Ct. 500, 82 L.Ed. 726 (1938); *Kentucky Trust Co. v. Glenn*, 217 F.2d 462 (6th Cir. 1954)."
>
> *Id.* at 583.

Both cases stand for the time honored proposition that if the tax is excessive, it is arbitrary and capricious, and must be set aside.

McGee's assessment of valuation for several items was arbitrary in that it lacked any basis in fact. As noted above, McGee assessed the plants in various stages of growth by simply dividing the 2155 plants into 10 categories, and then depreciating each category by 10% from a beginning value of $1,800.00 per plant. Yet Williams, ostensibly based on D.E.A. reports, valued the plants at $1,500.00 each. Keith Aller, D.E.A. Administrator for Montana, testified he was never consulted by McGee, and he participated in valuation of the plants at the $1,500.00 figure reported by Williams. But that value, according to Aller, was fixed based on a producing marijuana plant with 2 pounds of bud from a 12 foot plant. None of the plants seized which were in full growth were over 2 to 3 feet in height and no weight of bud was taken from any plant, even though the means to do so was available. Aller then conceded "there is no market for growing plants" from his experience. His value thus came from extrapolation of the value of the bud produced vis-a-vis the value of "street" or retail marijuana. He confessed a plant which was of the size found at the Kurth Ranch could not produce 2 pounds of marijuana. Such is consistent with the testimony of Richard Kurth, who was not questioned by McGee prior to the assessment, that the fully grown pygmy plants produced about .65 ounces per plant. Thus, the value of the plants was materially overvalued.

In addition, the breakdown by McGee into 10 categories is completely arbitrary. According to the best of the

testimony, over 1300 of the plants were mere cuttings as shown by the photographs taken by the Sheriff's Department on the day of the arrest. Based on the evidence, coupled with a failure of D.O.R. to instruct the Sheriff's Department to weigh the marijuana bud on each plant, which it is conceded could have been readily accomplished, the fixing of any value on the plants simply lack credible basis. Indeed, when answers to written interrogatories were made by the sheriff's office personnel, on behalf of the D.O.R., it developed that the plants in various stages of growth depended on the number of growing hours of each lot, which ranged from 18 to 12 hours. According to the verified answers, 1313 plants were located in 18 hour growing rooms and 918 located in 12 hour growing rooms. Deputy Sheriff Saville testified that the 1313 plants were mere cuttings placed in 4" by 4" boxes. From all the evidence, it is clear the cuttings are of no value. It is important to remember that under D.O.R. regulations "market value" is fixed at the time of confiscation of the drug. Mont. Admin. R. 42.34.101(2) (ARM). If the plant contains no THC substance on that date, no tax can be established for there is no dangerous drug. Thus, it is imperative the plants be dried, weighed, and chemically tested for THC to establish the tax. Weight is also a criteria under the Drug Tax Act. Such was not accomplished in this case. It is also clear that McGee did not have such information available, nor did he request such data, when he issued the tax assessment. Nor has the D.O.R. changed the assessment when such evidence was produced upon discovery. In sum, as to the plant valuation, D.O.R. has steadfastly clung to the totally inappropriate assessment method made by McGee on

December 7, 1987, being within one week of the day he received only a plant count from the sheriff's office. From this record, there is absolutely no basis, other than by speculation, to fix a tax on the plants because the best evidence is that the plants themselves either have no retail value, or the total chemical substance and weight was not developed by appropriate means available to the D.O.R.

The other two categories which also fit into the same class of arbitrary assessment are those dealing with hash oil and hash tar. Aside from McGee's lack of knowledge and experience, it now appears plain from the record that after further examination some of the vials of hash tar reported to the D.O.R. on December 1, 1987, were in fact empty. This fact was discovered between the date of November 18 and December 1, 1987, but was never reported to McGee by Williams. It resulted in the sheriff's department lowering its estimate of market value of the cache by over $100,000.00. Neither did McGee ever view the vials himself in making the assessment. A tax of $29,500 based on 118 ounces of so-called hash tar is clearly arbitrary and capricious when the 118 ounces does not in fact exist. Therefore, there is simply no way to compute the present value of 118 ounces of hash tar from the information supplied to the D.O.R. by the Sheriff's Office.

When Officer Williams initially reported the matter to D.O.R. on November 16, 1987, he struck out the quantity under Item 2 of "Seven gallons of hash oil." The report of December 1, which formed the basis of the assessment, reports no quantity under Item 2 and no value. The tax assessment made May 6, 1988, is based on

896 ounces of hash oil. Taking judicial notice that one gallon equals 128 ounces, it is obvious McGee used the seven gallon figure which was stricken from the report by the sheriff's office. It remains a mystery to this date as to the true quantity of alleged hash oil. This issue is more exacerbated when one considers that some of the samples taken from the gallon jugs (reported as 10 to the forensic laboratory) show no evidence of THC. Under the D.O.R. theory, such lack of chemical substance disqualifies the liquid as a controlled substance. Moreover, the record in this case conclusively shows that McGee never had any information provided to him from any source as to the market value of the hash oil. Indeed, no such evidence exists in the record. McGee failed to follow the statutory duty required of him under the Drug Tax Act, namely, to fix the tax based on the greater of a comparison between 10% of market value as opposed to a flat statutory rate. Clearly, McGee's action in failing to follow a statutory directive is arbitrary. It is noteworthy McGee recognized such legal duty because he fixed the tax on marijuana after comparing market value and the flat rate and took the greater number.

Finally, the Dangerous Drug Tax statute, in provisions pertinent to this case, provides for the taxation of hashish as defined in 50-32-101. The terms hash oil or hash tar are not defined in either code section. The D.O.R. taxed the hash tar and hash oil as hashish. It could be argued that under § 15-25111(2)(b)(iv), a tax of $100.00 per ounce may be levied on any substance containing or purported to contain any amount of dangerous drug not otherwise provided for in subsection (2). A substance containing THC may fit into this subparagraph but the

D.O.R. did not apply such provision, and it is now bound by its tax approach. Section 50-32-101(14) defines hashish "as distinguished from marijuana, means the mechanically processed or extracted plant material that contains tetrahydrocannabinol (THC) and is composed of resin from the cannabis plant." Hashish is an extraction of the active ingredients of marijuana plants. *See, State v. Randall*, 540 S.W. 2d 156, 158 (Mo. 1976). The chemists from the forensic laboratory correctly stated that hash oil, a liquid substance, is undefined in the Montana law. Such is true of hash tar. However, the means used by Kurth to extract the THC substance from the marijuana plant by boiling in alcohol does fit into the hashish definition of mechanically extracting plant material that contains THC and is composed of resin. *Webster's Dictionary* (Third International 1961) defines resin as a preparation consisting chiefly as a drug extracted by solvency (as by alcohol). Consequently such substance, if properly valued or fairly reported in weight or content, could have been taxed as hashish under the Montana Dangerous Drug Tax Act. In effort to avoid Plaintiffs' contrary argument, the D.O.R. claims the Plaintiffs are estopped from asserting the liquid substances seized were not hashish as taxed, because Richard Kurth pleaded guilty under plea bargaining to possession of hashish. It is noteworthy that the Trustee is also a party Plaintiff to this action, acting on behalf of the unsecured creditors. Obviously, the Trustee is not estopped to contest the claim. Further, all other Debtors as criminal Defendants pleaded guilty to possession of marijuana, not hashish. Moreover, the better reasoned legal authorities recognize a distinction in applying the doctrine of collateral estoppel in cases based

upon trial and conviction as opposed to pleas of guilty. *Northwestern Nat. Casualty Co. v. Phalen*, 182 Mont. 448, 597 P.2d 720, 727 (1979) states:

> "Phalen's plea of guilty to felony assault is not conclusive either as to his policy coverage or the duty of Northwestern to defend him in a tort action. *Teitelbaum Furs, Inc. v. Dominion Insurance Company (1962)*, 38 Cal. 2d 601, 25 Cal. Rptr. 559, 375 P.2d 439, 441; *Brahawn v. Transamerica Insurance Company* (Md. 1975), 276 Ma. 396, 347 A.2d 842, 848."

Teitelbaum Furs, Inc., relied upon by the Montana Supreme Court, states the reasoning for such rule.

> "A plea of guilty is admissible in a subsequent civil action on the independent ground that it is an admission. It would not serve the policy underlying collateral estoppel, however, to make such a plea conclusive. 'The rule is based upon the sound public policy of limiting litigation by preventing a party who has had one fair trial on an issue from again drawing it into controversy.' (Bernhard v. Bank of America, 19 Ca1.2d 807, 811, 122 P.2d 892, 894.) 'This policy must be considered together with the policy that a party shall not be deprived of a fair adversary proceeding in which fully to present his case.' (*Jorgensen v. Jorgensen*, 32 Cal. 2d 13, 18, 193 P.2d 728, 732.) When a plea of guilty has been entered in the prior action, no issues have been 'drawn into controversy' by a 'full presentation' of the case. It may reflect only a compromise or a belief that paying a fine is more advantageous than litigation. Considerations of fairness to civil litigants and regard for the expeditious administration of criminal justice (see, *Vaughn v.*

> *Jonas*, 31 Ca1.2d 586, 594, 191 P.2d 432) combine to prohibit the application of collateral estoppel against a party who, having pleaded guilty to a criminal charge, seeks for the first time to litigate his cause in a civil action." *Id.* at 441.

From the above authorities, the guilty plea of Richard Kurth is not binding on him, the Trustee or the other Plaintiffs. All of the Plaintiffs have the right to litigate in this civil proceeding whether hash tar or hash oil can be taxed as hashish under the Dangerous Drug Tax Act,[1] and if so by what criteria. In fact, that issue was never raised in the criminal proceedings.

The next item taxed by the D.O.R. was 100 pounds of shake at $100.00 per ounce for a total tax of $160,000.00 plus penalty, administrative fee and interest. The deputy sheriff's Drug Tax Report valued the shake at $200.00 per pound market value. At the outset, it becomes obvious that the tax assessed on this substance is 8 times its market value. McGee testified that in his 20 years of experience he has never levied a tax on property which is

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[1] D.O.R. acknowledges that hash oil is defined under federal law both by the D.E.A. and under the federal criminal sentencing guidelines. 18 U.S.C. Appdx. ch.2, § 201.1 (1989). As a result, there is a definition in existence which could be adopted by the Montana legislature. *See, U.S. v. McMahan*, 673 F.Supp. 8 (D. Me. 1987) for a description of the Federal Controlled Substances Act, 21 U.S.C. 812. As stated in *U.S. v. Walton*, 514 F.2d 201, 203 (D.C. Cir. 1975) and *U.S. v. Kelly*, 527 F.2d 961 (9th Cir. 1976), the Federal Controlled Substances Act of 1970 defines marijuana to include those parts of marijuana which contain THC and excludes those parts which do not. The Montana statute by contrast differentiates between marijuana and hashish and fails to broadly define marijuana as does the federal act.

8 times the market value. Plaintiff argues that because of such gross disparity to market value, the tax imposed is confiscatory, being therefore penal in nature. The Dangerous Drug Tax Act requires the tax be fixed at the greater of 10% of market value or $100.00 per ounce. Aller testified that shake has a market value in Montana at wholesale of $200.00 per pound and $250.00 to $500.00 per pound at retail. Both deputy sheriffs who participated in the arrests testified there is a market for such substance in Montana and that the shake could be upgraded by a device called a "marygin" which separates the stems and seed from the leaves. Such product would be a derivative of marijuana. Plaintiff's witness, Rosenthal, states the material was not saleable, but I reject Rosenthal's testimony on grounds that Rosenthal is not a credible witness. Rosenthal is a drug culture author who promotes the cultivation of marijuana and other controlled substances through his writings. He testified he never used marijuana, but his writings are replete with a contrary story. His bias and prejudice in favor of drug culture related activities such as Kurth's is obvious for that is how he makes his living. I therefore disregard all of his testimony as I find he is not a credible witness.

The above arguments presented by the Plaintiffs also are raised as to the tax imposed on 211 ounces of marijuana found in plastic bags ready for sale by Kurths. This material was the finished product. While Plaintiffs make some argument that the weighing of each bag should have been done on an individual basis, and chemically tested, I find the deputy sheriff weighed one bag at 1/4 pound and then simply multiplied the rest of the bags to arrive at the 8 pound result. The additional marijuana

cache was weighed at 2230 grams. I conclude such effort was sufficient. The tax imposed by D.O.R. on such material was at $100.00 an ounce, or $1,600.00 per pound, greater than 10% of the market value of the product, which was fixed at $2,000.00 per pound. Again, in making this assessment, McGee followed the proper statutory mandate.

Plaintiffs' constitutional arguments are necessary to address as to the items of shake and marijuana because I find the evidence sufficient as to weight and quality to allow the D.O.R. to tax such items. In other words, the Drug Tax Reports, the laboratory results, and McGee's assessment of the tax on these items was not arbitrary, but was based on credible weight, chemical analysis of the product, and established market value.

Plaintiffs do not dispute that "the unlawfulness of an activity does not prevent its taxation." *Marchetti v. United States*, 390 U.S. 39, 88 S.Ct. 697, 19 L.Ed. 2d 889, 895. The Plaintiffs contend the tax is another fine or penalty which follows arrest and therefore, runs afoul of the double jeopardy and due process clauses of the U.S. Constitution. Plaintiffs rely principally on *U.S. v. Halper*, 490 U.S. ___, 109 S.Ct. 1892, 104 L.Ed. 2d 487 (1989).[2] A number of

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[2] In the Pre-Trial Order, the Plaintiff specifically raised as a contention that the Drug Tax places Plaintiff twice in jeopardy. Under "Law Problems" it is stated, "If the court wishes to analyze this case under *United States v. Halper*, 109 S.Ct. 1892 (1989), a separate factual inquiry will be needed, witnesses will need to be called and evidence presented far differently from that set forth in this order." The evidence should have been presented as the matter was an issue noted in the Pre-trial Order. Neither party prior to or during trial moved to bifurcate

lower court decisions discussing or applying Halper have been cited by both parties. *See, U.S. v. Hall,* 730 F.Supp. 646 (D. N.D. Pa. 1990); *U.S. v. Pani,* 717 F.Supp. 1013 (S.D. N.Y. 1989); *U.S. v. A Parcel of Land with Bldg. L. Thereon,* 884 F.2d 41 (1st Cir. 1989); *U.S. v. Marcus Schloss & Co., Inc.,* 724 F.Supp. 1123 (S.D. N.Y. 1989) (Dicta); *U.S. ex. rel. McCoy v. Med. Review, Inc.,* 723 F.Supp. 1363 (N.D. Cal. 1989); *U.S. v. U.S. Fishing Vessel Maylin,* 725 F.Supp 1222 (S.D. Fla. 1989); *Kvitka v. Board of Registration in Medicine,* ___ N.E. 2d ___, 407 Mass. 140, 1990 Mass. LEXIS 183 (1990); and *Randall Book Corp. v. State,* 558 A.2d 715 (Md. 1989). Some of the federal cases involved forfeiture statutes against real and personal property and distinguish *Halper* on that ground. Other cases are factually inapplicable or contain dicta.

The Double Jeopardy Clause of the Fifth Amendment protects against three abuses; (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. *North Carolina v. Pearce,* 395 U.S. 711, 717 (1969). The third of these protections is the one which Plaintiffs claim the D.O.R. has violated by making a substantial tax assessment when Plaintiff/Debtors were convicted of the crime on which the tax is based.

Basically, Plaintiffs argue that the imposition of this penalty, although done pursuant to a "civil" procedure, is in reality a further punishment for the criminal conduct

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the issue and all parties had notice of the contentions as is further discussed in this decision.

to which each Debtor pled guilty. In making its argument, Plaintiffs rely on the recent decision of the United States Supreme Court in *United States v. Halper,* supra.

In *Halper,* the Court considered the question of "whether and under what circumstances a civil penalty may constitute punishment for purposes of the Double Jeopardy Clause." *Id.* at 1901. A unanimous court held that "a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can be explained only as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term." *Id.* at 1902. The Double Jeopardy Clause, the court went on to hold, prohibits the imposition of such a civil sanction "to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution." *Id.* It is implicated when "the sanction [is] overwhelmingly disproportionate to the damages [defendant] has caused." *Id.*

In determining the purpose behind a civil sanction, the Court must look at more than just the language of the statute itself. As the *Halper* court stated:

> " . . . [W]hile recourse to a statutory language, structure and intent is appropriate in identifying the inherent nature of a proceeding, or in determining the constitutional safeguards that must accompany those proceedings as a general matter, the approach is not will [sic] suited to the context of the 'humane interest' safeguarded by the Double Jeopardy Clause's proscription of multiple punishments. This constitutional protection is intrinsically personal. Its violation can be identified only by assessing the character of the actual sanctions imposed on the individual

by the machinery of the state." *Id.* at 1901 (citation omitted).

Thus, the labels of "civil" and "criminal" are not of paramount importance in making this determination. *See, id.* A civil sanction constitutes punishment when the sanction as applied in the individual case serves the goal of punishment. *Id.* at 1901-1902.

In *Halper,* the Court restated its time-honored recognition of the fact "that in the ordinary case fixed-penalty-plus-double-damages provisions can be said to do no more than make the Government whole." *Halper,* 109 S.Ct. at 1902. The only proscription established by the Court in *Halper* is that "the Government may not bring a separate civil action based on the same conduct and receive a judgment that is not rationally related to the goal of making the Government whole." *Id.* at 1903. It is this second proceeding that triggers the protections of the Double Jeopardy Clause. *See, Id.*, n.10.

D.O.R.'s answer to the double jeopardy argument is that (1) the state has broad latitude in creating tax classifications and drawing lines which, in its judgment produce reasonable systems of taxation, *Kahn v. Sherwin,* 416 U.S. 351 355 (1974); *Regan v. Taxation with Representation,* 461 U.S. 540; (2) that states may tax income from illegal activity even though such income may be forfeited, *James v. U.S.*, 366 U.S. 213 (1961); and (3) the Montana Dangerous Drug Tax Act is not punitive since it does not require a finding of scienter, *Kennedy v. Mendoza-Martinez,* 372 U.S. 144, 168-169 (1963), but is simply an excise tax designed to partially compensate Montana for costs of rehabilitating drug users. D.O.R. cites the provision of the

Act wherein the tax proceeds are to be used for youth evaluation and chemical abuse aftercare programs, for grants to youth courts to fund assessments and independent juvenile offender facilities, and to fund drug law enforcement and education on a local level. According to D.O.R. "the tax is designed to recover some of the millions of dollars Montana spends each year because of illicit drugs,"[3] so the tax is to cover societal costs, and is therefore not punitive or penal in nature. This latter statement of D.O.R. is mere hyperbole, since the D.O.R. failed to introduce one scintilla of evidence as to cost of the above government programs or costs of law enforcement incurred to combat illegal drug activity. Moreover, Deputy Sheriff Saville was specifically asked by Plaintiffs' counsel if the witness had made *any* (even a rough) estimate as to the cost to the state on prosecution of the Kurth criminal investigations, arrest and conviction and he replied none was made. Consequently, the D.O.R., faced with the *Halper,* issue, which was raised at the Motion for Summary Judgment stage, put forth no effort at the trial stage, when it had an opportunity to do so, to show the tax is "rationally related to the goal of making the government whole." *Halper, Id.* at 1903. I have no doubt such evidence may be available, but it simply was not produced in this case.

It is difficult for this Court to rationalize such neglect of the issue when D.O R. stated in the Brief in Opposition

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[3] Brief of D.O.R. in opposition to Plaintiffs' Motion for Summary Judgment, p.16.

to Plaintiffs' Motion for Summary Judgment (incorporated by reference in its Post-Trial Brief) at page 17 as follows:

> "Even assuming the Drug Tax is subject to analysis under the *Halper* criteria, that case does not permit summary judgment based on the record now before this Court. *Halper* requires a particularized inquiry. As Justice Kennedy stated in his concurring opinion:
>
> > 'Today's holding, I would stress, constitutes an objective rule that is grounded in the nature of the sanction and the facts of the particular case. It does not authorize courts to undertake a broad inquiry into the subjective purposes that may be thought to lie behind a given judicial proceeding. (Citations omitted.) Such an inquiry would be amorphous and speculative, and would mire the courts in the quagmire of differentiating among the multiple purposes that underlie every proceeding, whether it be civil or criminal in nature.'
>
> * * *
>
> In *Halper* the case was remanded back to the District Court for a hearing the damage (sic) suffered by the Government. *Halper* did not exclude an inquiry into the social damages of the taxed activity. There simply is no record for the court to apply the *Halper* criteria to this case."

In denying Plaintiffs' Motion for Summary Judgment, this Court based its denial on the reasoning that numerous factual issues were in dispute or not in the record. Only a

trial could cure those deficiencies. The present record, after trial, is still woefully deficient.

D.O.R. further argues that *United States v. Sanchez*, 340 U.S. 42 (1950) is the case in point as to double jeopardy issue. *Sanchez* challenged a federal tax of $100.00 per ounce or fraction thereof on marijuana assessed under 26 U.S.C. § 2590(a) (2), which statute was later held unconstitutional in *Leary v. United States*, 395 U.S. 6 (1969) on grounds it violated the Fifth Amendment against self-incrimination. *Sanchez* was a tax case, and did involve a criminal action. In deciding the marijuana tax statute was valid, the Court noted that a tax does not cease being valid merely because it regulates, discourages or even definitely deters the activities taxed. *Id.* at 44. *Sanchez* is inappropriately cited by the D.O.R. as decisive of the double jeopardy issue. No such issue was present in *Sanchez*, namely, a multiple-punishment inquiry. *Halper* answers that merely because Congress or a state provides for a civil remedy this,

> " * * * does not foreclose the possibility that in a particular case a civil penalty authorized by the Act may be so extreme and so divorced from the Government's damages and expenses as to constitute punishment." *Id.* at 1898.

And since retribution and deterrence are the aims of punishment, and not "legitimate nonpunitive governmental objectives,"

> " * * * , it follows that a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can be explained only as also serving

> either retributive or deterrent purposes, is punishment, as we have come to understand the term." *Halper,* at 1902.

The tax which I have found to be legally imposed pursuant to Drug Tax Statute on the possession of marijuana exceeds $208,150.00 (without interest). If D.O.R. were allowed to impose this tax, without any showing of some rough approximation of its actual damages and costs which it seeks to recover to make the State whole, I would, as noted in *U.S. v. Hall,* supra, at 674, "be sanctioning the very type of 'clear injustice' which *Halper* prohibits," for, on such state of this record, the tax is punishing the Debtors twice for the same criminal conduct. I find further support for this holding that the tax is penal in nature when one considers, as noted early in this decision, that the tax imposed on the 100 pounds of shake, pursuant to the statute, results in a tax which is 8 times the acknowledged market value of the product.

Moreover, courts have recognized that drug tax statutes, like Montana's, are essentially penal in nature and assist in the enforcement of the state's criminal laws. *See. e.g., State of Kansas v. Durrant,* 769 P.2d 1174, 1181 (Kan. 1989) (" * * * , the state concedes in its brief that the primary purpose of K.S.A. 198 Supp. 79-5021 *et seq.* is to discourage or eliminate drug dealing"). *See also, Tovar v. Jarecki,* 173 F.2d 449 (7th Cir. 1949). Such inquiry is warranted in view of the admonition of the concurring opinion for Justice Kennedy, noted above, in applying the objective tests of *Kennedy v. Mendosa-Martinez,* 372 U.S. 144, 168-169 (1963). The punitive nature of the tax is evident here, because drug tax laws have historically

been regarded as penal in nature, the Montana Act promotes the traditional aims of punishment – retribution and deterrence, the tax applies to behavior which is already a crime, the tax allows for sanctions by restraint of Debtors' property, the tax requires a finding of illegal possession of dangerous drugs and therefore a finding of *scienter,* the tax will promote elimination of illegal drug possession, and the tax appears excessive in relation to the alternate purpose assigned, especially in the absence of any record developed by the State as to societal costs. Finally, the tax follows arrest for possession of illegal drugs and the tax report is made by law enforcement officers, not the taxpayer, who may or may not sign the report. All these aspects of the Drug Tax Act lead to the inescapable conclusion that it has deterrence and punishment as its purpose.

I reject Plaintiffs' alternative constitutional arguments dealing with excessive fines under the Eighth Amendment because the tax is not a fine in a criminal proceeding, *U.S. v. Sanchez,* 340 U.S. 42, 45 (1950), nor does it offend the due process or equal protection clauses in this tax case. *Commonwealth Edison Co. V. [sic] Montana,* 453 U.S. 609, (1980) (due process is not offended if party contesting the tax is afforded an opportunity to challenge the tax before conclusive judgment); *Metropolitan Life Ins. Co. v. Ward,* 470 U.S. 869 (1985); and *Lehnhausen v. Lake Shore Auto Parts Co.,* 410 U.S. 356 (1973) (State may impose different specific taxes upon different trades and professions and vary the rates). All drug dealers are treated equally under the Drug Tax Act, and such is a reasonable classification. Further, there is no unconstitutional delegation of legislative powers to the D.O.R. to

make a determination of market value. *Plum Creek Lumber Co. v. Hutton,* 608 F.2d 1283 (9th Cir. 1979); *Patterson v. Department of Revenue,* 171 Mont. 168, 557 P.2d 798 (1976). I finally reject Plaintiffs' arguments made under Article II, § 28 of the Montana Constitution and eminent domain as spurious.

In conclusion, I find and hold the Jeopardy Tax Assessments issued December 7, 1989, and May 6, 1988, are arbitrary and capricious as to the tax imposed on marijuana plants, hash oil and hash tar, and were made contrary to the provisions of the Drug Tax Act. I further conclude that if the tax on such products were rightfully imposed pursuant to the statute, each assessment, including that assessment for 1811 ounces of marijuana, constitutes double jeopardy to the Debtors, prohibited by the Fifth Amendment to the U.S. Constitution, pursuant to *U.S. v. Halper,* supra.

IT IS ORDERED the Plaintiffs' Objections to the Amended Proof of Claim filed by the Montana Department of Revenue in the sum of $864,940.99 pursuant to the Montana Dangerous Drug Act, Section 15-25-101-123, Mont. Code Ann. (1987) are granted and the Proof of Claim is denied.

IT IS FURTHER ORDERED that all sums recovered by the Defendant from the Plaintiff pursuant to the double jeopardy tax assessment shall be forthwith remitted to the Trustee, Robert G. Drummond.

The Clerk shall enter judgment.

/s/ John L. Peterson
JOHN L. PETERSON
United States Bankruptcy Judge
215 Federal Building
Butte, Montana 59701

Copy mailed to attached
parties in interest this
8th day of May, 1990.

/s/ Kathy Schelin
Deputy Clerk

MERLIN L. SORENSEN,
Plaintiff and Respondent,

v.

THE STATE OF MONTANA,
DEPARTMENT OF REVENUE,
Defendant and Appellant.
THE DEPARTMENT OF REVENUE,
Petitioner and Appellant,

v.

PAUL A. WILLIAMS, JR.,
Respondent and Respondent.

Nos. 91-379 and 91-569.
Submitted May 28, 1992.
Decided July 21, 1992.
Rehearing Denied Aug. 13, 1992.
49 St.Rep. 624.
254 Mont. 61.
836 P.2d 29.

DOUBLE JEOPARDY - TAXATION

1. Double Jeopardy
Double jeopardy clause protects citizens from second prosecution for same offense after acquittal or conviction, and from multiple punishments for same offense. U.S.C.A. Const. Amend. 5.

2. Double Jeopardy
Dangerous drug excise tax did not violate double jeopardy, despite contentions that tax was derived from criminal conviction and served purpose of punishment; tax had remedial purpose, was not intended as criminal sanction, and was not so punitive in purpose or effect that it

constituted criminal penalty. U.S.C.A. Const. Amend. 5; MCA 15-25-101 et seq.

3. Double Jeopardy
Dangerous drug excise tax was not derived from taxpayer's criminal conviction for possession of drugs, and this was not additional criminal penalty in violation of double jeopardy, even though law enforcement officers were required to report names of persons subject to tax; method of reporting tax due did not transform tax into criminal penalty. MCA 15-1-101 et seq., 15-25-101 et seq.; U.S.C.A. Const. Amend. 5.

4. Double Jeopardy
Dangerous drug excise tax did not serve goals of punishment rather than remedial purposes, and thus did not violate double jeopardy under rule that civil sanction may constitute punishment rather than being fixed penalty, amount of tax was based on quantity of drugs in taxpayer's possession. MCA 15-25-101 et seq.; U.S.C.A. Const. Amend. 5.

5. Taxation
State was not required to defend validity of dangerous drug excise tax as nonpunitive by providing summation of costs of prosecution and societal costs of drug use. MCA 15-1-101 et seq.

6. Double Jeopardy
Dangerous drug excise tax of $200 per gram for cocaine and $100 per ounce of marijuana was

not so grossly disproportionate as to transform tax into criminal penalty violating double jeopardy. MCA 15-25-101 et seq.; U.S.C.A. Const. Amend. 5.

7. Double Jeopardy
Dangerous drug excise tax did not on its face violate double jeopardy; excise tax was not criminal penalty, did not serve goals of punishment, and was neither excessive nor grossly disproportionate to harm suffered by government, and reporting procedures did not relate tax to criminal conviction. MCA 15-1-101, et seq., 15-25-113; U.S.C.A. Const. Amend. 5.

Appeal from District Court of Missoula County. Fourth Judicial District. (91-379)
Honorable John S. Henson, Judge.

Appeal from District Court of Lewis and Clark County. First Judicial District (91-569).
Honorable Jeffrey M. Sherlock, Judge.

See C.J.S. Workmen's Compensation § 555(9).

After defendants were convicted of possession of marijuana and cocaine, the Department of Revenue assessed excise tax under Dangerous Drug Tax. The District Courts found the tax violated double jeopardy, and appeals were taken. The Supreme Court, Justice Weber, held that: (1) drug tax was not multiple punishment in violation of double jeopardy, and (2) drug tax was not unconstitutional on it face.

Reversed.

JUSTICE HUNT dissented and filed an opinion in which JUSTICE TRIEWEILER joined.

For Appellant: **R. Bruce McGinnis,** Dept. of Revenue (91-379) and **Paul Van Tricht** argued, Dept. of Revenue (91-569), Helena.

For Respondent: **Clinton H. Kammerer** argued, Kammerer Law Offices, Missoula (91-379) and **Edmund F. Sheehy** argued, Cannon & Sheehy, Helena (91-569).

JUSTICE WEBER delivered the Opinion of the Court.

The Montana State Department of Revenue (DOR) appeals from two separate District Court rulings wherein the courts determined that the tax assessed by the DOR on Merlin L. Sorensen (Sorensen) and Paul A. Williams, Jr. (Williams) violated double jeopardy. We have combined these cases for appeal. We reverse.

The DOR assessed tax on Sorensen's possession of cocaine after the pled guilty to criminal possession of cocaine. In a declaratory action, the Fourth Judicial District Court granted summary judgment in favor of Sorensen finding that Montana's Dangerous Drug Tax, §§ 15-25-101, MCA et seq., is a criminal penalty and violates double jeopardy.

Likewise, after Williams pled guilty to criminal possession of marijuana, the DOR assessed tax on the marijuana Williams had in his possession. The DOR petitioned the First Judicial District Court to determine the constitutionality of Montana's Dangerous Drug Tax. The court found the Drug Tax violated double jeopardy.

The DOR appeals these rulings and raises the following issues for our review:

1. Is Montana's Drug Tax a multiple punishment which violates double jeopardy?

2. Is Montana's Drug Tax Act unconstitutional on its face?

Both Sorensen and Williams pled guilty to possession of dangerous drugs and received sentences and fines under Montana's criminal code. Subsequently, the DOR assessed tax under Montana's Dangerous Drug Tax Act, §§ 15-25-101, MCA et seq. In both cases, the District Court held Montana's Drug Tax violated double jeopardy.

I

Is Montana's Drug Tax a multiple punishment which violates double jeopardy?

[1] The Drug Tax clearly violates double jeopardy if it is a criminal penalty. Double jeopardy protects citizens from a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense. *North Carolina v. Pearce* (1969), 395 U.S. 711, 717, 89 S.Ct. 2089, 23 L.Ed.2d 656.

Next, the Drug Tax may violate double jeopardy if it is an excessive civil sanction. *United States v. Halper* (1989), 490 U.S. 735, 109 S.Ct. 1892, 104 L.Ed.2d 487. In *Halper*, the Court stated that civil as well as criminal sanctions may constitute punishment and violate double jeopardy when the sanction, as applied to the individual, serves the goals of punishment rather then the remedial purposes of compensating the government for its loss.

Halper at 448, 109 S.Ct. at 1901-1902, 104 L.Ed.2d at 501-502.

[2] The DOR contends that double jeopardy does not attach to Montana's Drug Tax because the tax is an excise tax for raising revenue, not a criminal penalty or civil sanction. Appellees contend Montana's Drug Tax is a criminal penalty, and thus, violates double jeopardy.

In *United States v. Ward* (1980), 448 U.S. 242, 100 S.Ct. 2636, 65 L.Ed.2d 742, the Court held that a federal fine imposed for failure to notify officials of an oil spill was a civil sanction, not a criminal penalty, and did not violate double jeopardy. First, the Court determined that Congress intended to establish a civil penalty. Next, using criteria established in *Kennedy v. Mendosa* (1963), 372 U.S. 144, 83 S.Ct. 554, 9 L.Ed.2d 644, it determined that the penalty was not so punitive in purpose or effect that the civil remedy was transformed into a criminal penalty. The *Kennedy* factors include whether the sanction: involves an affirmative disability or restraint, has historically been regarded as a punishment, requires a finding of scienter, promotes retribution and deterrence, applies to criminal behavior, has an alternate purpose, and is excessive in relation to the alternate purpose. *Kennedy* at 168-169, 83 S.Ct. at 567-568, 9 L.Ed.2d at 661.

The Supreme Court in *Ward* determined that Congress intended to establish a civil penalty. *Ward* at 250-251, 100 S.Ct. at 2642, 65 L.Ed.2d at 750-751. Similarly, here the Montana Legislature clearly intended to create a tax not a criminal sanction. In Chapter 563, Montana Session Laws 1987, the following descriptive paragraphs

precede the wording of the "Dangerous Drug Tax Act" itself:

> WHEREAS, dangerous drugs are commodities having considerable value, and the existence in Montana of a large and profitable dangerous drug industry and expensive trade in dangerous drugs is irrefutable; and
>
> WHEREAS, the state does not endorse the manufacturing of or trading in dangerous drugs and does not consider the use of such drugs to be acceptable, but it recognizes the economic impact upon the state of the manufacturing and selling of dangerous drugs; and
>
> WHEREAS, it is appropriate that some of the revenue generated by this tax be devoted to continuing investigative efforts directed toward the identification, arrest, and prosecution of individuals involved in conducting illegal continuing criminal enterprises that affect the distribution of dangerous drugs in Montana.
>
> THEREFORE, the Legislature of the State of Montana does not wish to give credence to the notion that the manufacturing, selling, and use of dangerous drugs is legal or otherwise proper, but finds it appropriate in view of the economic impact of such drugs to tax those who profit from drug-related offenses and to dispose of the tax proceeds through providing additional anti-crime initiatives without burdening law abiding taxpayers.

The intention of the Montana Legislature to enact a revenue producing tax on drugs is clear. Thus, we conclude Montana's Dangerous Drug Tax Act satisfies the first tier of the *Ward* analysis.

Next, we analyze the tax under the *Kennedy* factors to determine whether the tax is so punitive in either purpose or effect as to negate the intention to create a tax. First, the tax does not impose any affirmative disability or restraint upon the taxpayer. The taxpayer is required to pay an assessment based on the quantity of drugs in his possession, and is not subject to incarceration or any other restraint of his liberty or privileges.

Next, the tax has a remedial purpose other than promoting retribution and deterrence. Section 15-25-122, MCA, earmarks the use of the tax funds collected to defray the costs of drug abuse. The tax collected is used for such things as youth evaluations, chemical aftercare, chemical abuse assessments and juvenile detention facilities. The tax collected is based on the quantity of drugs possessed or stored by the taxpayer, and is not excessive in relation to the remedial purposes addressed in § 15-25-122, MCA.

Next, several state courts as well as federal courts have upheld the legitimacy of a tax on the transfer or possession of dangerous drugs. In *United States v. Sanchez* (1950), 340 U.S. 42, 71 S.Ct. 108, 95 L.Ed 47, the Court determined that taxes on illegal activities are not necessarily penal or unconstitutional. "A tax does not cease to be valid merely because it regulates, discourages or deters the activities taxed, even though the revenue raised by the tax is negligibie." *Sanchez* at 44, 71 S.Ct. at 110, 95 L.Ed. 49. Similarly, in *State v. Berberich* (Kan. 1991), 811 P.2d 1192, and *Harris v. State, Department of Revenue* (Fla.App 1. Dist. 1990), 563 So.2d 97, both courts upheld the validity of their state marijuana taxes as legitimate exercises of taxing power, not improper penalties or fines.

Thus, we conclude a tax on dangerous drugs has not been historically regarded as a punishment.

Finally, the tax is based on possession and storage of dangerous drugs. Where possession gives rise to the tax, we conclude that the Act does not involve a finding of scienter.

Respondents argue that the scienter factor is not material where the crime, criminal possession of dangerous drugs under Title 45, MCA, similarly requires no scienter. Respondents claim double jeopardy is violated under the Act because the taxpayer is subject to both a criminal penalty and a tax for the same conduct. We disagree.

In *Helvering v. Mitchell* (1938), 303 U.S. 391, 399, 58 S.Ct. 630, 633, 82 L.Ed. 917, 922, the Court allowed both a civil and criminal penalty for the same act or omission. It held that double jeopardy did not attach to a tax fraud penalty where Congress had created a civil procedure for collecting the penalty and the amount of the penalty was remedial. *Helvering* at 401-404, 58 S.Ct. 634-636, 82 L.Ed. 923-925. Here, as in *Helvering*, the tax is remedial and collected through a separate administrative procedure. Thus, although the conduct of possessing dangerous drugs subjects the taxpayers to both a criminal penalty and a tax, we conclude that it is not so punitive in purpose or effect that it negates the legislative intent to create a civil sanction.

[3] Williams contends Montana's Dangerous Drug Tax is derived from the taxpayer's criminal conviction. Thus, it is a criminal penalty and violates double jeopardy. Williams emphasizes that the tax is not imposed on

persons in legal possession of drugs. Next he points out the tax may be collected as part of the fine imposed in a criminal conviction, or recovered from forfeited property. Finally, unlike other compliance based tax reporting, Title 15, MCA, does not provide for taxpayer compliance prior to arrest. Rather, under § 15-25-113, MCA, law enforcement officers are required to report to the DOR the names of persons subject to the tax. We do not find merit in these contentions.

Here, the assessment of the drug tax does not rest on a criminal conviction. As previously discussed, both civil and criminal penalties may attach to the same act or omission. *Helvering*, 303 U.S. 399, 58 S.Ct. at 633, 82 L.Ed. 922. Further, we do not conclude that the method of reporting the tax due on the possession of dangerous drugs or the method of collecting the amount of tax authorized by statute or administrative rules transforms this tax into a criminal penalty.

We conclude Montana's Dangerous Drug Tax is not derived from a criminal conviction.

[4] Both respondents contend Montana's Dangerous Drug Tax is a criminal penalty. However, in the alternative, if this court finds the tax is not a criminal penalty, they contend it violates double jeopardy under *Halper*. In *Halper* the Court held that a civil sanction violates double jeopardy when it serves the goals of punishment rather than the remedial purposes of compensating the government for its loss. *Halper* 490 U.S. at 448, 109 S.Ct. 1901-1902, 104 L.Ed.2d at 501-502. In that case, Halper, a medical service manager submitted sixty-five inflated claims to medicare demanding a $12 payment on each

claim, when the company was actually entitled to $3 per claim. Halper received a $2000 penalty for each false claim totalling $130,000. The Court concluded that the tremendous disparity between the government's damages of $585 and the civil penalty of $130,000 served the goals of punishment and violated double jeopardy. *Halper*, 490 U.S. at 452, 109 S.Ct. at 1904, 104 L.Ed.2d at 504.

We do not find *Halper* controlling. The court in *Halper* limited its ruling to similar cases. It stated: "What we announce now is a rule for the rare case, where a fixed-penalty provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused." *Halper* at 449, 109 S.Ct. at 1902, 104 L.Ed.2d at 502. *Halper* involved a civil sanction and a fixed penalty per offense which was not based on remedial costs. As mentioned, the penalty was $2000 for each event regardless of how small the dollar amount was in terms of cost to the government. In contrast, the Montana Dangerous Drug Tax is an excise tax based on the quantity of drugs in the taxpayer's possession.

[5] We note that both District Courts held the tax was excessive and punitive, not remedial, because the DOR failed to provide a summation of the costs of prosecution and societal costs of drug use. However, unlike the civil sanction in *Halper* where such proof may be required, a tax requires no proof of remedial costs on the part of the state. *Commonwealth Edison Co. v. State of Montana* (1980), 189 Mont. 191, 615 P.2d 847. In *Commonwealth* this Court held that the state is not required to

defend the validity of an excise tax by offering a summation of the costs of governmental benefits. *Commonwealth* 189 Mont. at 207, 615 P.2d at 855-856.

[6] Finally, respondents contend the tax was excessive. Sorensen was assessed a tax of $200 per gram, or $4,216 for his possession of 21.08 grams of cocaine. Similarly, Williams was assessed a tax of $100 per ounce, or $1,260 for his possession of 12.6 ounces of marijuana. We do not conclude that this tax is excessive. It is neither a fixed penalty as in *Halper*, nor is the amount of tax so grossly disproportionate as to transform this tax into a criminal penalty which violates double jeopardy. We also note that the foregoing rates of tax on various drugs are comparable to those in other states and also comparable to the amounts in effect for many years during the effective period of the Federal Drug Tax Act which has now been repealed.

We hold that Montana's Dangerous Drug Tax is not a multiple punishment and does not violate double jeopardy.

II

Is Montana's Drug Tax Act unconstitutional on its face?

[7] The court in Williams held that Montana's Dangerous Drug Tax Act, on its face, violated the double jeopardy clause of the Fifth Amendment to the United States Constitution. We disagree. As stated previously, the tax is not a criminal penalty and does not rest on a criminal conviction. Further, under the *Halper* analysis

the tax does not serve the goals of punishment. Neither is the tax excessive or grossly disproportionate to the harm suffered by the government. Finally, the reporting procedures outlined in § 15-25-113, MCA, do not relate the tax to a criminal conviction. Rather, they protect the taxpayer's Fifth Amendment right against self-incrimination.

We hold Montana's Dangerous Drug Tax Act is constitutional on its face.

Reversed.

CHIEF JUSTICE TURNAGE, JUSTICES HARRISON, McDONOUGH and GRAY concur.

JUSTICE HUNT dissenting.

I dissent. Once again the majority uses the club of the "drug crisis" to crack the shield of the Bill of Rights. Montana's Drug Tax Act clearly violates a constitutional right against double jeopardy through the use of multiple punishments.

As the United States Supreme Court stated in *Halper*, the labels of "criminal" and "civil" are not of "paramount importance." *United States v. Halper* (1989), 490 U.S. 438, 447, 109 S. Ct. 1892, 1901, 104 L. Ed. 2d 487, 501. To determine whether a civil penalty amounts to a criminal penalty "requires a particular assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve." *Halper*, 490 U.S. at 448.

In *Halper*, the United States Supreme Court held that:

> [U]nder the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to any additional civil sanction to the extent that the second sanction may not be fairly characterized as remedial, but only as a deterrent or retribution.

Halper, 490 U.S. at 448-49. Both Williams and Sorensen were previously convicted and punished before the DOR assessed the tax. Clearly, the facts of this case fit the mandate of *Halper* because the Montana Drug Tax is a civil sanction which violates double jeopardy by serving the goals of punishment rather than the remedial purpose of compensating the government for its loss.

Not only does the tax serve the goals of punishment, it fails to bear any rational relationship to the goal of restoring to the State its losses incurred when enforcing its drug laws, particularly when considering the excessive criminal fines imposed by § 45-9-101 through -127, MCA. In addition, the DOR failed to provide any evidence which would establish the societal cost of prosecuting these cases. Indeed, the majority bestows upon the DOR an unfettered license to impose an arbitrary, unequal, and unfair tax.

Although there is evidence that the legislature intended to create a civil penalty, the purpose and effect of the statute is still punishment and deterrence. The Montana Drug Tax Act has previously been litigated in the federal system. As United States Bankruptcy Court Judge for the District of Montana, John L. Peterson, ruled:

> The punitive nature of the tax is evident here, because drug tax laws have historically been regarded as penal in nature, the Montana Act promotes the traditional aims of punishment – retribution and deterrence, the tax applies to

> behavior which is already a crime, the tax allows for sanctions by restraint of Debtors' property, the tax requires a finding of illegal possession of dangerous drugs and therefore a finding of *scienter*, the tax will promote elimination of illegal drug possession, and the tax appears excessive in relation to the alternate purpose assigned, especially in the absence of any record developed by the State as to societal costs. Finally, the tax follows arrest for possession of illegal drugs and the tax report is made by law enforcement officers, not the taxpayer, who may or may not sign the report. All these aspects of the Drug Tax Act lead to the inescapable conclusion that it has deterrence and punishment as its purpose.

Drummond, Trustee et al. v. Department of Revenue (1990), 8 MBR 288. The Federal District Court affirmed the holding and reasoning of Judge Peterson. *In re Kurth Ranch* (D. Mont. April 23, 1991), No. CV-90-084-GF.

The majority attempts to hide behind the veil of facts of these cases to justify that the tax imposed is reasonable and not excessive. In Judge Peterson's case, the DOR attempted to impose a tax assessment in excess of $800,000 on the bankrupt estate of the Kurths. The DOR levied a tax on drugs that were not even defined in the statute. Nor did the DOR provide any rational explanation regarding how it determined the value of the drugs seized. Judge Peterson correctly found that tax to be so grossly disproportionate as to transform it into a criminal penalty. He recognized quite clearly, as did State District Court Judge John S. Henson in *Sorensen*, State District Court Judge Jeffrey D. Sherlock, in *Williams*, and Federal District Court Judge Paul G. Hatfield, in affirming Judge

Peterson, that a criminal penalty by any other name is still a criminal penalty.

For these reasons I would hold that the Montana Drug Tax Act is unconstitutional on its face and would affirm the lower court's decision.

JUSTICE TRIEWEILER concurs in the foregoing dissent of JUSTICE HUNT.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: KURTH RANCH; KURTH HALLEY CATTLE COMPANY; RICHARD M. KURTH; JUDITH M. KURTH, husband and wife; et al., Debtors.	No. 91-35878 D.C. No. CV-90-084-PGH ORDER (Filed May 3, 1993)
ROBERT G. DRUMMOND, Trustee Appellee, v. DEPARTMENT OF REVENUE OF THE STATE OF MONTANA, Appellant.	

Before: WRIGHT, Senior Circuit Judge, BEEZER, and LEAVY, Circuit Judges.

The panel has voted unanimously to deny the petition for rehearing. Judges Beezer and Leavy vote to reject the suggestion for rehearing en banc and Judge Wright so recommends.

The full court has been advised of the suggestion for rehearing en banc and no judge in active service has requested a vote to rehear the matter en banc.

Pursuant to Rule 35(b) of the Federal Rules of Appellate Procedure, the petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

May 18, 1993

Paul Van Tricht
Montana Department of Revenue
Office of Legal Affairs
P.O. Box 202701
Helena, MT 59620-2701

RE: Dept. of Revenue of Montana v. Kurth Ranch, et al.

Dear Mr. Tricht:

The application for an extension of time within the which to file a petition for a writ of certiorari in the above-entitled case was postmarked May 11, 1993 and received May 17, 1993. The application is returned for the following reason(s):

The date of the order denying the petition for rehearing was May 3, 1993. Therefore, the petition for writ of certiorari is due on or before August 1, 1993. Rules 13.1 and 13.4. In your application, you have requested up to and including June 25, 1993 to file your petition for writ of certiorari. Since the due date exceeds the time in which

you are requesting an extension of time, the application does not need to be filed with the Court.

Sincerely,
William K. Suter, Clerk
By: /s/ Jeffrey D. Atkins

In Forma Pauperis Department
(202) 479-3263

Enclosures

cc: James Goetz

Part 1

General Provisions

15-25-101. Short title. This chapter may be cited as the "Dangerous Drug Tax Act".

History: En. Sec. 1, Ch. 563, L. 1987.

15-25-102. Definitions. As used in this chapter, unless the context requires otherwise, the following definitions apply:

(1) "Dangerous drug" has the meaning provided in 50-32-101.

(2) "Department" means the department of revenue provided for in 2-15-1301.

(3) "Person" means an individual, firm, association, corporation, partnership, or any other group or combination acting as a unit.

History: En. Sec. 2, Ch. 563, L. 1987.

15-25-103 through 15-25-110 reserved.

15-25-111. Tax on dangerous drugs. (1) There is a tax on the possession and storage of dangerous drugs. Except as provided in 15-25-112, each person possessing or storing dangerous drugs is liable for the tax. The tax imposed is determined pursuant to subsection (2). The tax is due and payable on the date of assessment. The department shall add an administration fee of 5% of the tax imposed pursuant to subsection (2) to offset costs incurred in assessing value, in collecting the tax, and in any review and appeal process.

(2) With the exception that the tax on possession and storage of less than 1 ounce, 1 gram, or 100 micrograms of dangerous drugs must be that set forth below for 1 ounce, 1 gram, or 100 micrograms, the tax on possession and storage of dangerous drugs is the greater of:

(a) 10% of the assessed market value of the drugs, as determined by the department; or

(b) (i) $100 per ounce of marijuana, as defined in 50-32-101, or its derivatives, as determined by the aggregate weight of the substance seized;

(ii) $250 per ounce of hashish, as defined in 50-32-101, as determined by the aggregate weight of the substance seized;

(iii) $200 per gram of any substance containing or purported to contain any amount of a dangerous drug included in Schedule I pursuant to 50-32-222(1), (2), (4), and (5), or Schedule II pursuant to 50-32-224(1) through (4), as determined by the aggregate weight of the substance seized;

(iv) $10 per 100 micrograms of any substance containing or purported to contain any amount of lysergic acid diethylamide (LSD) included in Schedule I pursuant to 50-32-222(3), as determined by the aggregate weight of the substance seized;

(v) $100 per ounce of any substance containing or purported to contain any amount of an immediate precursor as defined under Schedule II pursuant to 50-32-224(5), as determined by the aggregate weight of the substance seized; and

(vi) $100 per gram of any substance containing or purported to contain any amount of dangerous drug not otherwise provided for in this subsection (2).

(3) The tax imposed under this section may be collected before any state or federal fines or forfeitures have been satisfied.

History: En. Sec. 3, Ch. 563, L. 1987; amd. Sec. 1, Ch. 421, L. 1989.

15-25-112. Exemptions. The tax imposed pursuant to 15-25-111 does not apply to any person authorized by state or federal law to possess or store dangerous drugs. The burden of proof of an exemption from 15-25-111 is on the person claiming it.

History: En. Sec. 4, Ch. 563, L. 1987.

15-25-113. Administration and enforcement – department rules. (1) All law enforcement personnel and peace officers shall promptly report each person subject to the tax to the department, together with such other information which the department may require, in a manner and on a form prescribed by the department.

(2) The deficiency assessment provisions of 15-53-105, the civil penalty and interest provisions of 15-53-111, the criminal penalty provisions of 15-30-321(3), the estimation of tax provisions of 15-53-112, and the statute of limitations provisions of 15-53-115 apply to this tax and are fully incorporated by reference in this chapter. The department may adopt such rules as are necessary to administer and enforce the tax.

History: En. Sec. 5, Ch. 563, L. 1987.

15-25-114. Tax review. A person aggrieved by an assessment pursuant to 15-25-111 or an exemption decision pursuant to 15-25-112 may seek a review of the assessment or exemption decision pursuant to 15-1-211.

History: En. Sec. 6, Ch. 563, L. 1987; amd. Sec. 7, Ch. 811, L. 1991.

Compiler's Comments

1991 Amendment: Substituted "may seek a review of" for "may appeal" and at end substituted "15-1-211" for "Title 15, chapter 2, part 3".

Applicability: Section 31, Ch. 811, L. 1991, provided: "[This act] applies to requests for refunds received by and the notices of additional tax issued by the department of revenue pursuant to [section 1] [15-1-211] after December 31, 1991."

15-25-115. Warrant for distraint – suspension of lien during incarceration. If all or part of the tax imposed by this chapter is not paid when due, the department may issue a warrant for distraint as provided in Title 15, chapter 1, part 7. The resulting lien shall have precedence over any other claim, lien, or demand thereafter filed and recorded. The period during which the lien may be enforced is suspended during any period of incarceration of the person upon whom the tax is imposed.

History: En. Sec. 7, Ch. 563, L. 1987; amd. Sec. 2, Ch. 421, L. 1989.

15-25-116 through 15-25-120 reserved.

15-25-121. Accounts. (1) There is an evaluation special revenue account within the state treasury, for use by the department of family services. One-third of the taxes

collected under 15-25-122 shall be deposited in the account.

(2) There is a chemical abuse assessment special revenue account within the state treasury, for use by the department of justice. One-third of the taxes collected under 15-25-122 shall be deposited in the account.

History: En. Sec. 8, Ch. 563, L. 1987; amd. Sec. 3, Ch. 421, L. 1989.

15-25-122. Disposition of proceeds. (1) The department shall transfer all taxes collected pursuant to this chapter, less the administrative fee authorized in 15-25-111(1), to the state treasurer on a monthly basis.

(2) The state treasurer shall deposit one-third of the tax to the credit of the department of family services to be used for the youth evaluation program and chemical abuse aftercare programs.

(3) The treasurer shall credit the remaining two-thirds of the tax proceeds as follows:

(a) one-half to the department of justice to be used:

(i) for grants to youth courts to fund chemical abuse assessments; and

(ii) for grants to counties to fund services for the detention of juvenile offenders in facilities separate from adult jails, as authorized in 41-5-1002; and

(b) one-half to the account created by 44-12-206(3) if a state government law enforcement agency seized the drugs. If a local government law enforcement agency seized the drugs, then that amount must be credited to

the treasurer or finance officer of the local government, be deposited in its general fund and be used to enforce drug laws.

15-25-123. Special revenue account. (1) There is created a special revenue account to be called the dangerous drug tax administration account.

(2) All administrative fees collected under 15-25-111(1) shall be deposited by the department into the dangerous drug tax administration account.

(3) The money in the dangerous drug tax administration account may be expended by the department to administer the tax and pay any refund required by this chapter.

(4) The appropriation made in subsection (3) is a statutory appropriation as provided in 17-7-502.

CONSTITUTION

of the

UNITED STATES OF AMERICA

Amendment 5

Criminal actions– Provisions concerning – Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

List of States With Drug Taxes

ALABAMA	Code of Alab. 1989 Supp. § 40-17A-1 *et seq.*
ARIZONA	Ariz. Rev. Stat. 1989 Supp. 42-1201 *et seq.*
COLORADO	Col. Rev. Stat. 1989 Supp. § 39-28.7-101 *et seq.*
CONNECTICUT	Conn. Gen. Stat. § 12-650 *et seq.*
FLORIDA	Fla. Stat. Ann. § 212.0505
GEORGIA	Ga.Code Ann. 37 § 48-15-1 *et seq.*
IDAHO	Id. Code § 63-4201 *et seq.*
LLINOIS [SIC]	Ill. Stat. Ann 1989 Supp. 120 ¶ 2151 *et seq.*
INDIANA	Ind. Code § 6-7-3
IOWA	Chapt. 421A §§ 421A.1 *et seq.*
KANSAS	Kan. Stat. Ann. § 79-5021 *et seq.*
LOUISIANA	La. Stat. Ann. (Civil) § 47:2601 *et seq.*
MAINE	Me. Rev. Stat. Ann. 1989 Supp. 36 § 4433 *et seq.*
MINNESOTA	Minn. Stat. Ann. 1990 Supp. § 297D.01 *et seq.*
MONTANA	Mont. Code Ann. 1989 Supp. § 15-25-101 *et seq.*
NEBRASKA	Nebr. Rev. Stat. § 77-4301 *et seq.*

NEVADA	Nev. Rev. Stat. Ann. 1989 Supp. § 372A.010 *et seq.*
NEW MEXICO	N. Mex. Stat. Ann. § 7-18A-1 *et seq.*
NORTH CAROLINA	Gen. Stat. of N.C. § 105-113.105 *et seq.*
NORTH DAKOTA	Century Code Ann. 1989 Supp. § 57-36.1-01 *et seq.*
OKLAHOMA	Okl.Stat.Ann. 68 § 450.1 *et seq.*
RHODE ISLAND	Gen. Laws of R.I. 1989 Supp. § 44-49-1 *et seq.*
SOUTH CAROLINA	S.C. Code § 12-21-5010 *et seq.*
TEXAS	Vernon's Tex. Code Ann. (Tax) 1990 Supp. § 159.001 *et seq.*
UTAH	Utah Code Ann. 1989 Supp. 59-19-101 *et seq.*
WISCONSIN	Wisc. Stat. Ann. § 139.87 *et seq.*
WYOMING	Wyo. Stat. Ann. 1989 Supp. § 39-6-401 *et seq.*